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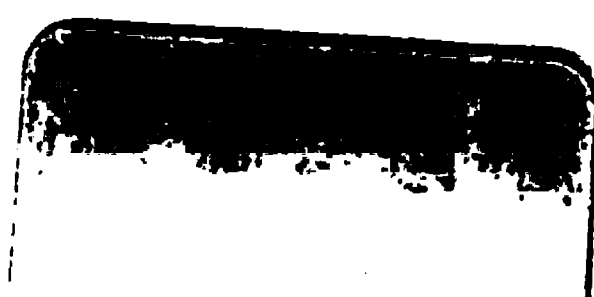
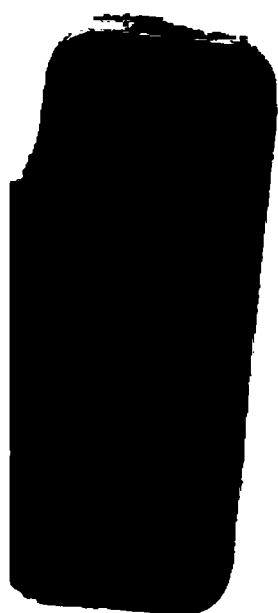
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Circuit Court of the United States

FOR THE SECOND CIRCUIT.

BY SAMUEL BLATCHFORD,
CIRCUIT JUDGE OF THE SECOND JUDICIAL CIRCUIT.

VOLUME XIV.

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J U D G E S

OF THE CIRCUIT COURTS OF THE UNITED STATES

WITHIN THE SECOND CIRCUIT,

DURING THE TIME OF THESE REPORTS.

WARD HUNT, ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES.*

ALEXANDER S. JOHNSON,† }
SAMUEL BLATCHFORD,† }
CIRCUIT JUDGE OF THE SECOND JUDICIAL CIRCUIT.

DISTRICT JUDGES.

SAMUEL BLATCHFORD,‡ }
WILLIAM G. CHOATE,‡ }
SOUTHERN DISTRICT OF NEW YORK.

WILLIAM J. WALLACE, NORTHERN DISTRICT OF NEW
YORK.

CHARLES L. BENEDICT, EASTERN DISTRICT OF NEW
YORK.

DAVID A. SMALLEY,§ }
HOYT H. WHEELER,§ } VERMONT.

NATHANIEL SHIPMAN, CONNECTICUT.

* At the request of Mr. Justice HUNT, the Honorable MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States, held the Circuit Court of the United States for the Southern District of New York, under the provisions of § 617 of the Revised Statutes of the United States, and decided the cases which are stated to have been decided by him, after June 10th, 1878.

† The Honorable ALEXANDER S. JOHNSON died January 26th, 1878, and the Honorable SAMUEL BLATCHFORD was appointed Circuit Judge of the Second Judicial Circuit, in his place, March 4th, 1878, and took the oath of office, April 15th, 1878.

‡ The Honorable SAMUEL BLATCHFORD resigned the office of Judge of the District Court of the United States for the Southern District of New York, to take effect on the appointment and qualification of his successor, and the Honorable WILLIAM G. CHOATE was appointed in his place, March 25th, 1878, and took the oath of office April 15th, 1878.

§ The Honorable DAVID A. SMALLEY resigned the office of Judge of the District Court of the United States for the District of Vermont, to take effect on the appointment and qualification of his successor, and died March 10th, 1877, and the Honorable HOYT H. WHEELER was appointed in his place, March 16th, 1877.

***.* The following corrections should be made in this
Volume :**

Page 51, line 10 of syllabus, for " of " read " or "

" 129, " 10 from the bottom, for " seem " read " seems "

" 148, " 5, for " 1874 " read " 1876 "

" 177, " 15, after " and " insert " the "

**" 304, " 9 from the bottom, for " *Campbell v. Vance,* " read " *Vance
v. Campbell,* "**

" 487, the bottom line of the page should be the top line.

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. C A S E S
ARGUED AND DETERMINED
IN THE
Circuit Courts of the United States
WITHIN THE SECOND CIRCUIT.

THE UNITED STATES *vs.* JOHN HALLORAN AND OTHERS.

Under the 20th section of the Act of July 20th, 1868, (15 *U. S. Stat. at Large*, 133,) the producing capacity of a distillery, and not the amount of spirits produced, is made the measure of taxation.

An assessment by an officer is not a condition precedent to the collection of taxes, when the statute prescribes the amount to be paid; and such amount can be recovered in an action of debt.

In an action upon a distiller's bond, an erroneous assessment, which did not include the amount actually due, as prescribed by the statute, is not conclusive against the Government.

(Before SHIPMAN, J., Southern District of New York, October 3d, 1876.)

SHIPMAN, J. This action was tried by the Court upon an agreed statement of facts which is made a part of the record. It is only necessary to give briefly the conclusions of law which I think are applicable to the case.

The producing capacity of the distillery of Halloran was duly and truly fixed, by a survey, made in accordance with the provisions of the 10th section of the Act imposing taxes on distilled spirits, approved July 20th, 1868, (15 *U. S. Stat. at Large*, 129,) at 1,530 gallons of spirits *per diem*, eighty *per centum* thereof being 1,224 gallons. The Government

The United States v. Halloran.

claims to recover of the defendants as follows: a tax of fifty cents per gallon upon 12,240 gallons, the same being 80 *per cent.* of the admitted producing capacity of said distillery for the ten days during which the distillery was operated in March, 1869, amounting to.....\$6,120

Also upon the barrel tax on said quantity of spirits, at 40 gallons per barrel, being 306 barrels, at \$4, amounting to..... 1,225

The *per diem* tax, which it is admitted amounts to..... 780

The *per diem* tax upon the days during which the distillery was admitted to have been suspended .. 28

Total \$8,153

Said Halloran actually manufactured, during said period, 11,134 ⁵⁰/₁₀₀ gallons of spirits, and no more, which was ascertained and determined by the assessor to be the entire amount which the distiller manufactured, and upon this amount he paid, at the rate of fifty cents per gallon..... 5,567 20

The amount of barrel tax and *per diem* tax collected by distraint was..... 1,496

The amount paid upon barrel tax by Halloran, was 100

Amount paid \$7,163 20

Balance of taxes claimed to be due..... \$989 80

(1.) The 20th section of the Act of July 20th, 1868, (15 *U. S. Stat. at Large*, 133,) made the producing capacity, under the above recited facts, and not the amount produced, the measure of taxation. "At all events, the distiller was made taxable for a production of spirits not less than 80 *per cent.* of the producing capacity of his distillery, as determined by the survey, whether that quantity was actually produced by

The United States v. Halloran.

him or not, or whether he used a bushel of grain or not. Eighty *per cent.* of the estimated, (not the actual,) capacity of the distillery was the smallest amount for which he was made taxable. If he actually produced more, or if the quantity of grain or other materials used for distillation, *as ascertained by the assessor*, showed a larger production, he was made taxable to the full extent of that production thus shown." (*The Collector v. Beggs*, 17 Wall., 182; *Pahlman v. The Collector*, 20 Wall., 189.)

(2.) An assessment by an officer is not a condition precedent to the collection of taxes, when the statute prescribes the amount to be paid, and this amount can be recovered in an action of debt. "An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself." (*Dollar Savings Bank v. United States*, 19 Wall., 227.) The 20th section of the Act of July 20th, 1868, indeed, requires that the assessor shall determine whether the distiller has accounted, in his return, for the product of the materials which he used, and a rule is prescribed by which such ascertainment shall be made. No question is raised, in this case, that the true amount of spirits which was actually made, or which should have been made, was not returned and correctly ascertained by the assessor. It is admitted, that the spirits actually made did not equal eighty *per cent.* of the producing capacity. Under these facts, the law itself, and the assessor, determined that the measure of the taxation to be imposed upon the distiller was eighty *per cent.* of the producing capacity. He had become liable to pay upon the eighty *per cent.*, and might have been liable to pay more, in case he had produced beyond the minimum rate, or if the quantity of grain used for distillation, as ascertained by the assessor, showed a larger production.

(3.) In an action upon the distiller's bond, an erroneous assessment, which did not include the amount actually due, as prescribed by the statute, is not conclusive against the Government. It is claimed by the defendant that the assessor had

The United States v. Halloran.

assessed upon the distiller's return, and had found that \$1,496 only was due for barrel tax and *per diem* tax, which amount was collected by distraint, and that the assessment so made and paid is final and conclusive, and the Government can have no action for the recovery of any tax for the month of March, even though the tax which was collected was for a less sum than might have been assessed under the law. The principles which have been declared in *Dollar Savings Bank v. United States*, (19 Wall., 227,) and in *Clinkenbeard v. United States*, (21 Wall., 65,) seem to be decisive upon this point. In the former case, it was held that an action of debt would lie to recover an amount due for taxes which had not been assessed. The latter case decided, that, in an action against a distiller, upon his bond, to recover the amount of an assessed tax, the assessment, though not appealed from, was not *res adjudicata*, and was not conclusive, and that the defendant was not precluded from showing its erroneous character. The Government is not suing upon the assessment of the officer, but has resorted to an action of debt, to recover a tax which has never been assessed in accordance with the statute. The assessment which was made is not such a judgment or decree as to bind the Government in this collateral proceeding.

Let judgment be entered in favor of the plaintiffs, for \$989 $\frac{80}{100}$, and interest from the date of the amendment of the declaration.

Roger M. Sherman, (Assistant District Attorney,) for the United States.

Robertson & Close, for the defendant Devlin.

The United States v. Tuska.

THE UNITED STATES vs. PHILIP H. TUSKA.

A plea in abatement to an indictment, averred that 48 persons were summoned as grand jurors; that the names of such persons were not drawn by the clerks, as required by the Rules; that one of the grand jurors was a non-resident; and that several of them were not possessed of the proper property qualification. It did not aver any prejudice to the accused. On demurrer to the plea: *Held*, that the plea was bad.

(Before BENEDICT, J., Southern District of New York, October 6th, 1876.)

BENEDICT, J. This case comes before the Court upon a demurrer to a plea in abatement. All the averments of the plea relate to the constitution of the grand jury that found the indictment. The material averments are, that 48 persons were summoned by the marshal to attend as grand jurors; that the names of such persons were not drawn by the clerks, as required by the Rules; that one of the grand jurors was a non-resident; and that several of them were not possessed of the proper property qualification. These are all the averments of the plea deserving of any particular notice, and they are simple averments of irregularities, unaccompanied by any averment of any prejudice to the accused. The law applicable and authoritative here upon such questions is to be found in the case of *United States v. Reed*, (2 *Blatchf. C. C. R.*, 435,) subsequently considered and approved in *United States v. Tallman*, (10 *Id.*, 21.) The determination of the Court in Reed's case was, that the statute of the State, adopted by the statute of the United States, having taken away the right of challenging the array of grand jurors, has, by implication, taken away the right to raise the objection in any form. The same case also determines, that an objection founded upon the want of qualification of grand jurors, either as individuals or as a panel, is within the scope of the statute and unavailing.

It has been contended here, that, as, in the cases above re-

The United States v. Tuska.

ferred to, the questions determined were not presented by a plea in abatement, they furnish no authority in the present case, where the objections are taken by plea. But, it is obvious, from the language of these decisions, that their effect was not intended to be dependent upon the form in which the questions were brought up. In neither of the cases were the questions raised by a challenge; and, in the latter case, it is plain that the points in judgment were determined as if raised by plea.

Furthermore, I incline to the opinion, that, where there is no averment of injury or prejudice to the defendant, irregularities such as are here complained of become matters of mere form, within the scope of § 1025 of the United States Revised Statutes, which provides, that no trial, judgment or other proceeding upon an indictment shall be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

In regard to the order directing that 48 persons be summoned to attend, I desire to say further, that it is not open to the charge of irregularity. No statute of the United States fixes the number of persons to be summoned, nor has the State law as to number been adopted; and, moreover, there is no uniform law of the State upon the subject, in force throughout the locality comprising the Southern District of New York. In some parts of the District the State law allows the summoning of 50 persons; in other parts the number is 36.

Resort to the common law also fails. Whether, at common law, an irregularity would be committed by the sheriff in selecting and summoning more than 24 jurors to attend as grand jurors, I do not stop to inquire. If such be the rule applicable to an officer charged with the duty not only of summoning but of selecting good and lawful men to compose a grand jury, the reason of the rule fails under our system of procedure, where the marshal has simply to summon designated persons, and the Court, in the absence of any other mode provided by statute, must select the requisite number of fit persons from those in attendance. In the absence of

The United States v. Tuska.

statutory regulation, the Court must necessarily determine what will be a sufficient number to enable a grand jury to be constituted; and the existence of this power will be found to be implied in § 808 of the United States Revised Statutes. It should be added, that it has been of frequent occurrence, in this District, to direct that 48 persons be summoned; and, in at least one instance, an order similar to the one in this case was made by the Circuit Judge. Nor is there any ground to contend that any possible injustice could arise to the defendant from the course pursued. The plea shows, that, of those who were summoned, only 22 persons fit to be sworn attended, and that all these were sworn. As to Rule 60, which has been referred to, it has been deprived of effect by the subsequent Rules, but it supposes the Court to be vested with power to fix the number of jurors to be summoned.

To the averment of the plea, that the names were not drawn by the clerks, as the Rules require, the plea itself furnishes a sufficient answer, for, it sets up the certificate of the clerks that the names were drawn in conformity with the Rules. It cannot be permitted to a defendant to set up such a certificate as part of the record upon which the Court has acted, and then to contradict it by his plea. Moreover, upon the plea as worded, it must be presumed that the drawing was done by the deputy clerks.

In regard to the averment of want of qualifications in some of the grand jurors as to residence and property, there appears to me to be no room to contend that the objection is not fully covered by the decision in Reed's case. It may, however, be said, in addition, that the ground for a rejection of a similar objection, found by the Supreme Court of Massachusetts, (*Commonwealth v. Smith*, 9 Mass., 107,) in the form of the indictment used in that State, differing, as it does, from the English form, and from the form used in many of the States, is to be found in this case. The averment of the present indictment, in this particular, is similar to the averment in the Massachusetts case. I add further, that the argument from

The United States v. Tuska.

inconvenience and delay, which the Courts of this State have given controlling weight adversely to the present objection, (*The People v. Jewett*, 3 *Wendell*, 314,) seems to me to be entitled to control here. If, in every criminal prosecution, the accused has the legal right, by a plea in abatement, to raise the question of the residence and the property of each of the members of the grand jury, and require that issue to be tried before a jury, before calling upon him to answer the charge, it is easy to see, that, in localities like New York, the practice would substantially render the trial of an offender optional with him, for, in the absence of any better method of selecting juries for Courts of the United States than that permitted by existing laws, it doubtless happens that some one of the grand jury is open to question as to his residence or property. It is also easy to see, that, if matter forming ground for a challenge is allowed to be the foundation for an issue for the jury, when set up by plea in abatement, the effect of the provision of the statute requiring that "all challenges, whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the Court," (§ 819,) will be substantially destroyed.

In the discussion of this case I have been referred to many and conflicting decisions in the Courts of the several States, upon the questions under consideration, but, as before stated, the adjudged cases in this Circuit, to which reference has been made, must furnish the law for the present case; and they compel the sustaining of this demurrer.

It is ordered that the plea be set aside, and that the accused plead anew to the indictment.

Benjamin B. Foster, (*Assistant District Attorney*,) for the United States.

Benjamin F. Tracy, *John J. Allen*, and *Edward T. Wood*, for the defendant.

Ayres v. The Western Railroad Corporation.

JOHN B. AYRES*vs.***THE WESTERN RAILROAD CORPORATION.**

Goods, in the course of transportation from West Springfield, Massachusetts, to Cleveland, Ohio, were destroyed by fire in the depot of the Western Railroad Corporation, at East Albany, New York. That corporation, when it received the goods at West Springfield, gave a receipt, setting forth that it had received 4 cases, marked J. B. C., Cleveland, Ohio. The receipt, on its face, said: "This contract, and the responsibility of the parties hereto, being limited and controlled by the rules and regulations printed upon the back of this receipt;" "it being also understood, that this corporation assumes no liability beyond the end of its own line, and that, so far as it acts as agent for other parties participating in the joint transit aforesaid, said parties are separately liable." The back of the receipt said: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight." "The company will not hold itself liable as common carriers, for articles of freight, after their arrival at their place of destination and unloading at the company's warehouse or depots." "All articles of freight must be taken away within 24 hours after being unladen from the cars." The cases were marked as described in the receipt, and also marked, "care of Western Transportation Co.," a corporation engaged in carrying freight on the Erie Canal. The terminus of the road of the Western Railroad Corporation was at East Albany. The goods arrived there and were unladen at its warehouse. Three days afterwards the warehouse took fire, and the goods were consumed, without fault on the part of the corporation. It did not appear that notice of the arrival of the goods was given by the corporation to the Western Transportation Company: *Held*, that the Western Railroad Corporation was liable for the value of the goods.

(Before WALLACE, J., Southern District of New York, October 19th, 1876.)

WALLACE, J. The plaintiff seeks to recover the value of certain paper destroyed by fire in the freight depot of the defendant, while in course of transportation from West Springfield, Massachusetts, to Cleveland, Ohio, and other points beyond the terminus of the defendant's road. Upon the shipment of the goods, the defendant gave the shipper a receipt

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in the following terms: "Western Railroad Corporation, West Springfield, June 26th, 1861. Received of Southworth Mfg Co., 10 cases paper, marked and numbered—4, J. B. Cobb & Co., Cleveland, Ohio—5, J. R. Dayton, Quincy, Ill.—1, Ogden, Brownell & Co., Keokuk, Iowa; contents and value unknown; to be transported to, and delivered at the depot there, to, on the payment of freight therefor, together with such expenses as shall be shown by vouchers to have been advanced on the same; this contract and the responsibility of the parties hereto being limited and controlled by the rules and regulations printed upon the back of this receipt, as also by the terms of their printed tariffs of freight; and it being, also, understood, that this corporation assumes no liability beyond the end of its own line, and that, so far as it acts as agent for other parties, participating in the joint transit aforesaid, said parties are separately liable." Upon the back of the receipt there was an endorsement: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight." Then follow a number of rules, among which are these: "The company will not hold itself liable, as common carriers, for articles of freight, after their arrival at their place of destination and unloading at the company's warehouse or depots." "All articles of freight must be taken away within twenty-four hours after being unladen from the cars, the company reserving the right of charging storage on the same, or placing the same in store at the risk and expense of the owner, if they see fit, after a lapse of time." The several parcels of goods were marked as described in the receipt, and also marked "care of Western Transportation Co.," a corporation engaged in carrying freight upon the Erie Canal. The terminus of the defendant's road was at East Albany, where the goods arrived and were unladen at the defendant's warehouse on the 2d of July; and, on the 5th of July, the warehouse took fire and the goods were consumed, without fault on the part of the defendant. It is not shown that notice of the arrival of the goods was given by the defendant to the Western Transporta-

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tion Company, but it does appear, that, according to the usual course of business, an agent of the latter visited the warehouse of the defendant, to look for goods, prior to the 5th of July.

Giving effect to the receipt delivered by the defendant to the shipper, as a special contract, which restricts the common-law liability of the defendant as a carrier, and renders it liable only according to the conditions mentioned upon the face and back of the receipt, the defendant was liable as a carrier for the goods destroyed in its warehouse, while in course of transportation. The goods were to be transported by the defendant to its depot, for the purpose of delivery there to a second carrier, in the course of transportation to the ultimate destination of the goods; and, in such case, the carrier is liable as a carrier while the goods are in its warehouse awaiting delivery to the second carrier, unless it is absolved by notice of their arrival to the second carrier, or by the terms of a special contract with the shipper. (*Condit v. Grand Trunk R. Co.*, 54 N. Y., 500; *Railroad Co. v. Mfg. Co.*, 16 Wall., 318; *Mills v. Michigan Central R. R. Co.*, 45 N. Y., 622; *McDonald v. Western R. R. Co.*, 34 N. Y., 497; *Rawson v. Holland*, 59 N. Y., 611.) It is not claimed that the defendant had become exonerated from liability by giving notice of the arrival of the goods to the second carrier, but it is insisted that it is exempted because of the condition on the back of the receipt, which reads, that it will not hold itself liable as a common carrier, for such articles, "after their arrival at their place of destination and unloading at the company's warehouse or depots." The argument for the defendant is, that the place of destination, within the language of the condition, is that point on the defendant's road where it is to deliver the goods to some other carrier or to the consignee. If this position is sound, doubtless, the defendant was liable only as a warehouseman, and, as the goods were destroyed without fault on its part, is not liable for them. To sustain this position it is necessary to maintain, that, when goods are addressed to a point beyond the line of the first carrier, consigned to the

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care of a connecting carrier, their place of destination is that place where the first carrier is to deliver them to the second carrier. Such a conclusion is opposed to the plain and ordinary meaning of language. The goods were shipped to Cleveland and other points further west, and the packages were marked, "care of Western Transportation Company." So far as the defendant was concerned, its duty would have been discharged by delivering the goods to the Western Transportation Company, but it does not follow from this that the Western Transportation Company was the place of destination. So to hold would require the rest of the address to be disregarded. The place of destination is the place designated for the ultimate unloading of the goods, and is that point on the defendant's road, or on that of any connecting carrier, at which the consignee is to receive the goods according to the usual course of business of the carrier. Looking at the various terms of the receipt, it is apparent, that the receipt is designed to modify the liability not only of the defendant, but of the various connecting carriers who participate with it in the transportation; and, while some of the conditions are adapted to protect the defendant, many of them are inserted for the protection of the connecting carriers. It is framed to cover shipments for places on the defendant's line, and also for shipments to distant places upon or beyond the lines of connecting carriers who are to participate with the defendant in the transportation of the goods, and for whom the defendant is to act as agent in the transaction. Upon its face, the receipt provides that the defendant shall assume no liability beyond the end of its own line, and that "the parties participating in the joint transit" are to be separately liable, while the conditions upon the back of the receipt consist of "rules adopted by the several railroad corporations in regard to freight." It is framed to stand for a contract between the shipper and the defendant, and also for one between the shipper and the connecting roads who participate in the joint transit, so that both the defendant and the connecting carriers may find protection in the several conditions. This being the object in view, the meaning of

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the term in question seems obvious. It is used in two of the conditions only, one of which provides against liability for articles of freight "after their arrival at their place of destination and unloading at the company's warehouse," and the other that such articles "arriving at their place of destination must be taken away within twenty-four hours after being unladen." The place of destination is the ultimate destination of the goods. When this is on the defendant's road, unless the goods are taken away within twenty-four hours after their arrival and unloading, the defendant is liable only as warehouseman; when the place is upon the road of a connecting carrier, such carrier, after the twenty-four hours, ceases to be liable as carrier, and assumes only the liability of a warehouseman. This construction is consistent with the instrument as a whole, with the relations of the various parties to it, and with the nature of the transaction the receipt is intended to provide for. If the meaning of the conditions were doubtful, the construction to be given them should be one most strongly against the carrier. The conditions are designed to relax the common-law liability of the carrier—a liability which the shipper has a right to insist upon, and of which he is not to be deprived without clear evidence of his assent. If the meaning of such conditions is involved in any doubt, the doubt is to be resolved in his favor. The conditions in question are satisfied by the construction which has thus been placed upon them. These conclusions lead to a decision against the defendant.

But, if it should be conceded that the conditions upon the back of the receipt are so expressed as to refer to the warehouse of the defendant, and relieve the defendant from the obligations of a carrier after the arrival of the goods there, the same result must follow, because of the controlling authority here of the case of *Railroad Co. v. Mfg. Co.*, (16 Wall., 318.) It is there held, that the delivery by the carrier to the shipper, of a shipping receipt, which, upon its face, refers to conditions on the back, defining the terms of the carrier's responsibility, and its acceptance by the shipper, does not con-

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stitute a special contract between the shipper and the carrier, by which the liability of the latter is limited by the conditions on the back of the receipt. It is unnecessary to refer to or discuss the principles or the authorities which bear upon the doctrine thus held. The case, in effect, decides, that no act on the part of the shipper, short of an explicit agreement, will imply an assent on his part to a contract proposed by a carrier, modifying the liability of the latter. That this conclusion conflicts with many decisions of high authority in this country and England, must be conceded; but the case furnishes a rule of plain and certain application, and sweeps away many fine and artificial distinctions which have involved in confusion the whole doctrine of notices and special contracts, as affecting the rights and liabilities of common carriers. Some of these cases have turned upon the point, whether the conditions in a printed receipt were in small type or in large, and whether the receipt was taken deliberately or hurriedly, while one case in the Court of last resort in this State places controlling emphasis upon the fact that the receipt was taken by the shipper in a dimly-lighted car, and holds that it was, therefore, not a contract. (*Blossom v. Dodd*, 43 N. Y., 264.) Another case of the Supreme Court of the same State holds the receipt a contract, although taken by a foreigner ignorant of the language in which it was printed, and to whom no explanation of its terms was vouchsafed. (*Fibel v. Livingston*, 64 Barb., 179; see, also, *Warhus v. Savings Bank*, 21 N. Y., 543.) Thus, while one man is absolved from obligation because it may be inconvenient for him to inform himself of the terms of the proposed contract, another is held. The theory, of course, is, that assent to the proposed contract is or is not implied from the circumstances of the transaction, but the cases illustrate the utter uncertainty of the test of assent, when one man who is ignorant of the language of the proposed contract is presumed to assent, while another is absolved because, from the type in which it is printed, or the light by which he is to read it, he cannot acquaint himself with its terms without more or less inconvenience. The rule held by

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the Supreme Court of the United States is capable of certain and easy application, and, if adhered to, will go far to abrogate a class of contracts to which practically the carrier is the only party. Judgment is ordered for the plaintiff.

George Bliss, for the plaintiff.

George W. Miller, for the defendant.

THE UNITED STATES vs. JOHN VOLZ.

On a complaint before O., a United States commissioner in New York, against S., for having committed an offence against the United States, cognizable by the Courts of the District of Columbia, S. was committed by O. to await the issuing by the District Judge of a warrant for his removal for trial to such District. Before such warrant was issued, V. went before O., to justify as bail for S., and made oath before him to a deposition concerning his property, which was signed by him and entitled in the proceeding against S. Afterwards S. was released by the District Judge on bail, on a bail bond signed by V. It did not appear that the deposition of V. was exhibited to the District Judge, or that any further steps were taken before O. after the deposition was made. V., having been indicted for, and convicted of, perjury, in making, in such deposition, statements of material matter, which he did not believe to be true, moved for a new trial, on the ground that the deposition was not made in a case "in which a law of the United States authorizes an oath to be administered," within § 5892 of the Revised Statutes: *Held*, that the motion must be denied.

Up to the time of the issuing of a removal warrant, a commissioner under whose commitment a prisoner is held, has jurisdiction to entertain an application for his release on bail, and to administer an oath to a person who tenders himself for justification as good bail for such prisoner.

(Before BENEDICT, J., Southern District of New York, November 8th, 1876.)

BENEDICT, J. The prisoner was charged with having committed perjury in a certain written deposition made by him before John A. Osborn, a United States commissioner. Having been convicted, he now moves for a new trial, upon the ground that the facts do not make out the crime of perjury,

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as defined by § 5392 of the United States Revised Statutes. The facts are as follows: A complaint was made before John A. Osborn, a United States commissioner, against one Thomas P. Somerville, charging him with the crime of conspiracy. Upon such complaint the commissioner issued his warrant to apprehend Somerville, who, by virtue thereof, was thereafter apprehended and brought before the commissioner, and, an examination being waived, and it appearing that the offence charged was cognizable by the Courts of the District of Columbia, Somerville was committed by the commissioner to the custody of the marshal, to await the issuing by the District Judge of a warrant for his removal to the District where the trial was to be had. Thereafter, and before any removal warrant was issued by the District Judge, and while Somerville was in the custody of the marshal, by virtue of the commitment of the commissioner, the accused presented himself before the commissioner, to justify as bail for Somerville, and thereupon made oath to a deposition concerning his property, with the object of showing his sufficiency as such surety. This deposition was in writing, signed by the accused, and entitled *United States v. Thomas P. Somerville*. As the jury have found, it contained statements of material matter, which the deponent did not believe to be true. Thereafter, Somerville made application to Judge Blatchford to be released by him upon bail, to appear for trial in the District of Columbia, and tendered to Judge Blatchford a bail bond executed by the accused as his bail. This bond was accepted by Judge Blatchford, and Somerville thereupon was released upon such bail. It does not appear that the deposition made by the accused before Commissioner Osborn was exhibited to Judge Blatchford, or that any further steps were taken before Commissioner Osborn after the making of the deposition under consideration. Upon these facts the question arises, whether the deposition made by the prisoner before Commissioner Osborn was made in a case "in which a law of the United States authorizes an oath to be administered," within the meaning of § 5392.

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I am of the opinion that it must be held to have been so made. Plainly, the word "case," as used in the statute, is not to be confined to suits or proceedings strictly in Court. There are many instances where the laws of the United States authorize an oath to be administered, when no suit or criminal proceeding has been commenced. But, in the present instance, a criminal proceeding had been instituted before a commissioner, in which a prisoner had been arrested who was entitled to give bail, and in which a surety could lawfully justify under oath, as being good bail for such prisoner. It can make no difference, as to the validity of such an oath, whether the person making it be accepted or rejected as bail, nor is the oath rendered invalid by the fact that the proceeding before the commissioner stops with the justification of the bail. The deposition in question was made in such proceeding, and was left with the commissioner. It became then a part of that proceeding, and afforded foundation for a demand by Somerville to be released by the commissioner upon tendering the bond executed by such surety, whenever it might be deemed desirable to make such tender and demand.

It has been contended, in behalf of the defendant, that, at the time this oath was administered, the commissioner had no power to release Somerville on bail, and, consequently, no power to take the justification of a surety, because the offence appeared to have been committed in another District, and Somerville stood committed to await the action of the District Judge in regard to his removal to such District for trial. It is claimed that the power of the commissioner terminated with the issuing of the commitment. I do not so understand the law. The power to take bail exists in every case where a party has been arrested for any crime or offence against the United States, and it is in all cases to be taken for trial before such Court of the United States as by law has cognizance of the offence. This power never ceases with the issuing of a commitment. The requirement of the statute, (§ 1015,) is, that "bail shall be admitted upon all arrests in criminal cases, where the offence is not punishable by death;" and, in such

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cases, it may be taken by any of the persons authorized by § 1014 to arrest and imprison offenders. There is no provision that the right to give bail is to cease with the issuing of a removal warrant, and certainly the right must exist so long as no such warrant is issued. Until the removal warrant is issued, the prisoner is held in arrest under the commitment of the commissioner, and to that officer application may be made to be released from arrest, on giving bail for trial before such Court of the United States as the commissioner shall determine to have cognizance of the offence as proved before him. What power the commissioner may have after the District Judge shall have issued his warrant directing the prisoner to be removed to another District for trial, it is unnecessary now to consider. But, it seems plain, that, up to the time of the issuing of a removal warrant, the commissioner under whose commitment the prisoner is held has jurisdiction to entertain an application for his release on bail, and, by necessary consequence, jurisdiction to administer an oath to one tendering himself for justification as good bail for such prisoner. I am, therefore, of the opinion, that the offence of perjury, as defined by the statute, was committed by the accused, when, in a proceeding taken before Commissioner Osborn, to justify himself against the exceptions of the District Attorney to his sufficiency as bail for Somerville, a prisoner at that time in custody under the commitment of Commissioner Osborn, and entitled to be released by such commissioner upon giving good bail, he made a deposition containing material statements touching his property, which he did not believe to be true.

The motion is denied.

Benjamin B. Foster, (Assistant District Attorney,) for the United States.

Thomas Stewart, for the defendant.

JACOB E. BUEBK

vs.

WILLIAM IMHAEUSER AND OTHERS. IN EQUITY.

By an interlocutory decree, a master was ordered to report the profits received by the defendant from making, using and selling an improvement in time detectors, patented to the plaintiff, and also the damages which the plaintiff had sustained by reason of the infringement, over and above such profits. The master reported a certain sum as such profits, and also \$53 25 as damages on each one of 437 time-detectors made and sold by the defendant. The \$53 25 was arrived at, by taking \$75, the price for which the plaintiff sold his time-detectors, and deducting therefrom \$21 75, composed of \$18, cost of making, and \$3 75, commission paid for selling. The defendant was manufacturing under a patent, and was not a wilful infringer. It was not made to appear that those who purchased from the defendant would have purchased from the plaintiff: *Held*,

- (1.) That the basis adopted by the master for computing the damages was erroneous, in assuming that those who bought from the defendant would have bought from the plaintiff;
- (2.) That it was also erroneous in including in the \$53 25 the manufacturer's profit;
- (3.) That the amount of the defendant's profits was an adequate compensation for the injury which it had been shown the plaintiff had suffered.

(Before JOHNSON, J., Southern District of New York, November 11th, 1876.)

JOHNSON, J. Under the interlocutory decree in this case, the master was ordered, among other things, to report the gains and profits which the defendants, or either of them, had received from the manufacture, use and sale of the patented improvement of the plaintiff, and also to assess and report the damages, if any, which the plaintiff had suffered or sustained by reason of the infringement, over and above the said gains and profits. He found, and has reported, that the defendants, up to the time when Keinath left the firm, had sold 61 infringing time-detectors, with a profit, over and above the allowances he made to them for the cost and expenses, of

\$1,748 24; and that the subsequent sales of the other two defendants numbered 376, with a resulting profit, over and above the allowances, of \$3,748 28. The master has further reported, that the damages which the plaintiff had suffered were as follows: on the 61 time-detectors sold by all the defendants, \$53 25 on each; and on the 376 sold by Imhaeuser & Hahn, \$53 25 on each, amounting, for the latter, to the sum of \$20,022 00, and for the former to the sum of \$3,248 25. The defendants have excepted to the report in this particular, in due form, and contend that the master has erred in this ascertainment of damages.

The method in which the master has proceeded is apparent from the report. He has ascertained from the complainant that he sells his watches at \$75 each, and that they cost him about \$18 each: and that, on the average, he pays \$3 75 commissions for sales. These sums, deducted from \$75, gives what he calls a net profit of \$53 25 on each watch. This amount, multiplied by the number of watches which the defendants sold, produces the sums which the master has found as damages.

The 55th section of the patent act of July 8th, 1870, substantially re-enacted in section 4921 of the Revised Statutes, gives to a successful plaintiff in an equity suit for an infringement, the damages which he has sustained, in addition to the profits to be accounted for by the defendants. But, it by no means follows that, in every case, such damages are in excess of the amount of profits made by the infringer. As is said by Mr. Justice Clifford, in *Carew v. Boston Elastic Fabrics Co.*, (3 *Clifford*, 356, 370,) if it appears that the injuries which the complainant sustained by the infringement are greater than the gains and profits realized by the defendants, then the complainant is entitled to recover compensation for the excess of the injuries sustained beyond the gains and profits received by the defendants: and yet, in that case, although the plaintiff succeeded, the Court was of opinion that the recovery ought not to go beyond the gains and profits of the defendant. In the present case, the defendants were manufacturing, under a

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patent of the United States, the watches which are now adjudged to be an infringement of the plaintiff's patent. They were not wilful infringers, and, therefore, are not to be visited with punitive damages. It is only actual damages which are proved to have been sustained by the plaintiff that he can, in any event, recover. It is not enough that he may have suffered loss, for he cannot have compensation for conjectural losses. The losses must be proved and not guessed at. (*Philp v. Nock*, 17 Wall., 460.)

It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the defendants. The watches have been adjudged to be identical in principle, but they differ in structure and appearance; and it can not be known that those who bought the infringing article would have bought the plaintiff's watches under any circumstances. The difference in structure as well as the difference in price enter into that question, and no means are afforded for determining it by the proofs. (*Smith v. Prior*, 2 Sawyer, 461; *Carter v. Baker*, 1 Id., 512.) The inquiries suggested by those cases, as pertinent to the assessment of a plaintiff's damages, do not warrant the adoption of the result stated in the report. The damages in such a case must be confined to the direct and immediate consequences of the infringement, and not embrace those which are both remote and conjectural.

In *The Goodyear Dental Vulcanite Company v. Van Antwerp*, (9 Off. Gaz. of Pat. Office, 497,) Judge Nixon, speaking of the modes of ascertaining damages and profits, says: "In order to ascertain these, it is especially pertinent to inquire how the owner of the patent has seen fit to use his invention. He may retain a close monopoly in it, and then the damages are computed by investigating the defendant's profits, which are reckoned a fair criterion of the complainant's loss; or, he may grant license fees, allowing the benefits of his invention to every one who will pay a stipulated price for its use." In this the learned judge was but reiterating what had been said by the Supreme Court in granting a new trial in the case of

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Seymour v. McCormick, (16 *How.*, 480.) That Court declared, further, that "actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee would have made, if the infringer had not interfered with his rights, is a question of fact and not a judgment of law. The question is not what speculatively he may have lost, but what actually he did lose. It is not a judgment of law, or necessary legal inference, that, if all the manufacturers of steam engines and locomotives, who have built and sold engines with a patented cut-off or steam-whistle, had not made such engines, therefore, all the purchasers of engines would have employed the patentee of the cut-off or whistle."

There is another error involved in this assessment of damages, and that is, that the estimated profit of the patentee embraces not only that derived from the sale of the patent privilege, but also the whole manufacturer's profit upon the materials and workmanship of the whole article. When the inventor charges a royalty or license fee, he isolates the value of the use of his invention, and, separating it from all other things, fixes its value as against himself and in favor of others. If he also makes and sells the machine in which his invention is embodied, there will enter into the price, not only the cost of materials and the ordinary profit of manufacture, but also an amount of additional profit, which is, or is the equivalent of, this license fee, and adds to the price that additional sum, as compensation for the invention. It is this price of the invention, which the inventor is entitled to recover as damages against an infringer; and, in ordinary cases, it is this only. Wanton infringement may introduce other considerations, but such is the measure of damages when the case is one simply of infringement. In cases where the patent is for a distinct improvement, separable from the rest of the article, as, in the case put by the plaintiff's counsel, of a wagon with a patent pole, the rule is admitted and settled. (*Seymour v. McCormick*, 16 *How.*, 480; *Gould's Manufacturing Co. v. Cowing*, 12 *Blatchf. C. C. R.*, 243; *Mowry v. Whitney*, 14 *Wall.*, 620;

American Nicholson Pa. Co. v. Elizabeth City, 6 *Off. Gaz. of Patent Office*, 764; *Littlefield v. Perry*, 21 *Wall.*, 205, 228.) The same principle is, I think, applicable to a case of this kind. The watch is open to the manufacture of every one; and it is common to both the plaintiff's patented article and to the infringing article of the defendants. The wrong which the case shows the plaintiff to have sustained is the use of his invention in the making by the defendants of the infringing watches. They have taken his invention and used it in making the infringing watches; and it is the value of that use, the right to which belonged to the plaintiff, that they have appropriated to themselves. For this the plaintiff is entitled to recover in damages. But this rule has been disregarded, and the case does not furnish any evidence which can either support the actual finding or form the basis for a correction in this respect by the Court. The burthen, in this respect, was upon the plaintiff; and as the account of the profits made by the defendants, under the evidence, charges them with all that they have made by the use of the plaintiff's invention, and does not appear to be an inadequate compensation for the injury which he is shown to have suffered, a decree upon the basis of the computation of profits contained in the report will, in my opinion, do justice between the parties.

The exception already discussed is the principal objection to the report, and covers also the third and sixth exceptions.

The second exception has no foundation in the evidence or offers of the defendants. It does not appear to have been proposed to prove that the plaintiff had any license or patent fee. The offer was only to show what amount the plaintiff had recovered in another suit, which was immaterial.

The fourth and fifth exceptions seem to turn upon the appreciation of evidence by the master, and raise no question requiring examination.

The seventh exception is founded on an obvious mistake of the master in determining the effect of one of the exhibits. He has, by including a column of figures not forming part of the exhibit, found that the defendants had on hand 48 infring-

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ing watches, whereas it, in fact, only showed 28 to be so on hand. It will be modified accordingly.

The decree will separate the profits and damages awarded against all the defendants, \$1,748 24, and those awarded against Imhaeuser & Hahn, \$3,748 28, and will be with interest from the date of the master's report, February 19th, 1875. It must be settled upon notice, before being entered.

John Van Santvoord, for the plaintiff.

Arthur V. Briesen, for the defendants.

THE JOHN FARRON.

The case of *The Lottawanna*, (21 Wall., 558,) decides, that a material man furnishing repairs and supplies to a vessel in her home port, does not thereby acquire any lien upon the vessel, by the general maritime law, as received in the United States, but that, so long as Congress does not interfere to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated, in each State, by State legislation; that such contracts are maritime, and fall within the domain of the Admiralty jurisdiction; and that, when, in such cases, a lien is given by the State laws, such lien may be enforced by the District Courts of the United States, under the 12th Rule, as modified by the Supreme Court of the United States, May 6th, 1872.

The provision for a lien, made by a State lien law, will be enforced, when the contract is maritime, in the Courts of Admiralty, although the same law gives an unconstitutional power to the State Courts to proceed *in rem* to enforce such lien.

The statute of New York, of April 24th, 1862, (*Laws of 1862*, p. 956, § 1,) gives a lien on a vessel for a debt contracted by her "master, owner, charterer, builder, or consignee," "or the agent of either of them," within the State, on account of labor or materials furnished in the State for repairing such vessel. H., the owner of a vessel, contracted in writing to sell her to S., and delivered possession and control of her to S., who, as her apparent owner, contracted, in New York, upon her credit, a debt for repairs to her. In the contract of sale it was agreed that S. should have possession, and might make repairs, but that such repairs should not be a lien on the vessel, or a claim against H.,

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but the creditor had no notice of such agreement: *Held*, that there was a lien on the vessel for the debt, under such statute.

(Before JOHNSON, J., Southern District of New York, November 11th, 1876.)

JOHNSON, J. Since the decision of this case in the District Court, (7 *Benedict*, 53,) the Supreme Court of the United States, in the case of *The Lottawanna*, (21 *Wall.*, 558,) has declared the law in regard to some questions about which conflicting views were entertained by different judges. It must now be deemed settled, that material men furnishing repairs and supplies to a vessel, in her home port, do not thereby acquire any lien upon the vessel, by the general maritime law, as received in the United States, but that, so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated, in each State, by State legislation; that such contracts are maritime, and fall within the domain of the Admiralty jurisdiction; and that, when, in such cases, a lien is given by the State laws, such lien may be enforced by the District Courts of the United States, under the 12th Rule, as modified by the Supreme Court of the United States, May 6th, 1872. This view is maintained to be the law by the Supreme Court, while admitting that the practice may be somewhat anomalous, upon the ground that it has existed from the origin of the Government, and that, whatever may have been its origin, and whether it was or was not based upon the soundest principles, it has become firmly settled, and it is now too late to question its validity. These must be accepted as the controlling views of the Supreme Court upon this subject, and must be followed by this Court. In the cases of *The Edith* and *The Circassian*, (11 *Blatchf. C. C. R.*, 451, 472,) decided in this Court, in February, 1874, the views expressed by my learned predecessor must yield to the later judgment of the Supreme Court, in the case of *The Lottawanna*, in so far as they are not in harmony.

The principal point of difference material in this case is in respect to the power and rightfulness of maintaining the lien

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created by State legislation, while disregarding as unconstitutional the provisions of State statutes which attempt to confer upon State Courts the power to proceed *in rem*, in enforcement of such liens. It is this anomaly which the Supreme Court accepts as the law, and which, therefore, it is the duty of this Court to act upon. In the Courts of New York, (*In re The Josephine*, 39 *N. Y.*, 19, and *Brookman v. Hamill*, 48 *N. Y.*, 554,) the State lien law was held to be unconstitutional, because it attempted to give process *in rem*, and thus was held to invade the grant of Admiralty jurisdiction to the United States. The adjudication did not go beyond the validity of the proceeding *in rem*, and, therefore, the provision for the lien in the specified cases remains to be enforced, when the contract is maritime, in the Courts of Admiralty. The decisions in *The Edith* and *The Circassian* were made in view of the law as it was at the time understood, and also in view of the possibility that the Supreme Court might determine the law to be that material men had a maritime lien even in the case of a domestic vessel, and in the absence of any State law conferring a lien. I am, therefore, of opinion that the State law conferring a lien may, in case of a maritime contract, be availed of in the Courts of Admiralty.

The State law of April 24th, 1862, (*Laws of 1862*, p. 956, § 1,) gives a lien "whenever a debt * * * shall be contracted by the master, owner, charterer, builder, or consignee, of any ship or vessel or the agent of either of them, within this State, for either of the following purposes: 1st. On account of work done, or materials or other articles furnished, in this State, for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel." The claim of the libellants coming plainly within the designated purposes, the question is, whether the debt was contracted by a person sustaining such a relation to the vessel as is included in the terms employed by the statute. The debt was contracted upon the credit of the vessel, by Stevens, or Stevens and Gardner, who were in possession, and had the control of the vessel, by the consent of Hamill, the claimant, and he had been, and claims

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still to be, the owner. This possession was delivered about the 27th of May, 1872, and from that time on, until about the 1st of August, when the claimant took her from the marshal, on bonding her in this proceeding, he had no actual possession, and neither exercised nor attempted to exercise any control over her. On the 20th of May, 1872, Hamill, as owner, entered into a written contract, by which he agreed to sell the vessel to Stevens and Gardner, and they agreed to buy her, for \$10,000, payable in notes of \$1,250 each, with interest, at 3, 6, 9, 12, 15, 18, 21, and 24 months, made by Gardner, and endorsed by Stevens, with a mortgage on the boat as security, and policies of insurance to cover the same, payable, in case of loss, to the claimant. Hamill further agreed, by the same instrument, that, on the 25th of May, he would deliver a bill of sale to Gardner and Stevens, upon their delivering to him the notes, mortgage and policies, as above provided. It went on: "and I do agree to allow said Gardner and Stevens, upon delivery of said papers, to have possession of said steamboat called John Farron, and do all repairs and alterations which they wish to said boat; but the said repairs or alterations, of whatsoever kind or nature, shall not be a lien or claim upon said steamboat, or her owner, the said Henry F. Hamill, but shall be paid by said Gardner and Stevens." On the 25th, which was Saturday, nothing appears to have been done, but, on the 27th, the parties met at the Custom House, to carry out the bargain. It then appeared to be necessary to remeasure the boat, and that this could not be done till the proposed repairs were completed. The boat had been the property of the United States, and had been sold at auction, and purchased by Hamill, but he had not had her enrolled, and there were, therefore, no papers by which a formal bill of sale could be completed. Stevens and Gardner gave the requisite notes to Hamill, which, however, were wrong in form, and were, in a few days, replaced by others in correct form, which Hamill received and retained. No mortgage was given, for the same reason that the bill of sale was not executed. Hamill signed and acknowledged a printed bill of sale, under his seal, and

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dated May 27th, 1872, filling up none of the other blanks, except that his name, as sole owner of the steamboat or vessel called the "Ella M. Stevens," was inserted. This paper was left at the Custom House, with the Custom House brokers who were attending to the business. They were told by Hamill not to part with it without his orders, and it was subsequently given up by them to him. As they left the Custom House, Stevens asked Hamill when they could have possession, and was told that Hamill would instruct his watchman to give them possession. About June 1st possession was, accordingly, given. The boat was at Weehawken, and was brought, under the orders of Stevens, to the foot of Le Roy street, where Stevens went aboard, and took charge of her, and from that time he had the possession and control of the vessel. He hired persons as engineer and fireman, and put them on board, and employed and made contracts with mechanics to repair her. Hamill did not exercise any authority or control over the vessel from the time when possession was given by his orders to Stevens, until after this suit was instituted. Before possession was given to Stevens, he had said, in Hamill's presence and hearing, when they were at the Custom House, that they (Stevens and Gardner) were going to run the boat on the North river, and that he (Stevens) was going as master, and Gardner was to go as clerk.

It was not the intention of the parties that the title of the vessel should pass from Hamill to Stevens and Gardner, by the delivery of her into their possession; but it was their purpose to put her under their entire control, leaving the unfulfilled portion of the contract to be carried out in the future, by the completion of the bill of sale and the execution of the mortgage. Stevens and Gardner being thus in possession, by the consent of the owner, were enabled to appear as owners to third persons, and thus to obtain credit for the vessel as her owners, or through Stevens as her master. Having obtained fresh credit from the libellant, I think the vessel was liable to answer for the debt, under the statute of New York before cited. (*Hawes v. Bark James Smith*, 2 *Parsons on Sh. &*

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Ad., 146, note 2; *The May Queen*, 1 *Sprague*, 588; *Weaver v. The S. G. Owens*, 1 *Wallace, Jr., Rep.*, 359; *The Julia Smith*, 1 *Newberry*, 61.) I do not understand the position I have stated to be in conflict with what was said by the Court in *The Druid*, (1 *W. Rob.*, 391, 398,) nor with the explanatory observations of the same learned judge, in *The Bold Buccleugh*, (3 *W. Rob.*, 220, 231.) In the first of these cases, the question was as to the liability of the vessel for the wilful misconduct of the master in colliding with another vessel. It was said that the vessel was not liable unless the owner was, and it was held that the owner was not liable for the wilful trespass of the master. But the Court had no occasion to consider the effect of apparent ownership by consent of the actual owner. In the latter case the question was, whether a change of ownership did, under the circumstances, defeat a lien for damages for a collision occurring in the time of the former owner; and it was held that the claim could still be enforced against the vessel.

The agreement between Hamill and Stevens and Gardner, that they should subject the vessel to no lien by repairs, cannot prevent a lien occurring as to persons having no knowledge or notice of that agreement; and this appears to have been the fact in respect to the libellant.

The taking of the vessel to the dock in New Jersey for a single day, in the process of repairing her, was not a departure, within the meaning of the statute, and, therefore, no specification of the claim was necessary to be filed under the statute.

There must be a decree for the libellant in the usual form, which may be settled on notice.

Dennis McMahon, for the libellant.

Robert D. Benedict, for the claimant.

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A steam-tug, having a canal-boat in tow astern, going up the Hudson river, was hailed by the canal-boat to land her, and that she was leaking. The tug ran in towards a dock, and stopped and hailed the canal-boat to cast-off. She was cast-off by her hands, but one of the lines jammed. She had made no preparation of lines by which to reach the shore, and she had no anchor. She drifted up the river, and sank an hour or more after she was cast off. The tug went on and gave no aid to the canal-boat: *Held*, that both vessels were in fault, and that the tug was liable for one-half of the damages.

The value of the canal-boat is to be estimated as she was just before she was cast adrift by the tug.

(Before JOHNSON, J., Southern District of New York, November 11th, 1876.)

JOHNSON, J. The libel in this case was filed to recover for the loss of the canal-boat Frank Curran, which, as was alleged, was sunk by the fault of the claimants, while she was being towed from New York to Low Point on the Hudson river. The District Court decided (5 *Benedict*, 244,) that the claimants were not in fault in respect to any injury sustained by the canal-boat during the voyage from New York to Fort Montgomery, where she was detached from the propeller, but that those injuries were owing to her unseaworthiness and her being in a leaky condition. It further decided, that, in the casting off of the canal-boat from the propeller at Fort Montgomery, under the circumstances proved, both vessels were in fault—the canal-boat in having made no proper preparation of her lines for landing, and in having no anchor; the propeller in leaving the canal-boat unassisted, knowing that she was being cast off in consequence of some difficulty, before reaching her destination. It, therefore, decreed, that the propeller was bound to answer to the owners of the canal-boat for one-half the damages thus incurred, and declared those damages to be equal to the value of the canal-boat in the condition she was in when she was cast off. The cause was thereupon referred to a commissioner to ascertain these damages and report the same to the Court. He subsequently reported the dam-

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ages at \$3,500, with interest to the date of the report, amounting in all to \$4,200. To this report the claimants excepted on various grounds. Upon the hearing they were all overruled, and the Court pronounced its decree, awarding to the libellants one-half of the damages so assessed, with interest from the date of the report. (See 6 *Benedict*, 272.) From this decree the libellants appealed to this Court, and they claim that all the damages sustained by the canal-boat ought to have been recovered by the libellants. The claimants also appealed, claiming that the propeller was not in fault, and ought not to be charged with any part of the damages sustained by the loss of the canal-boat. They likewise contend that the exceptions to the commissioner's report, or some of them, ought to have been allowed, and that the decree should, in any case, have been for a smaller sum.

After a careful examination of the evidence, it is established to my satisfaction, that the agreement for towing this canal-boat was not made at Poughkeepsie, but at New York, with the captain of the propeller, and that the allegations of the answer in that respect are substantially sustained. In the execution of the contract the persons in charge of the propeller exhibited, in respect to the speed at which they moved, much consideration for the condition of the canal-boat. In the ten hours preceding the time of the final start, they made only 45 miles, which, in itself, is a substantial overthrow of the claim on the part of the libellants, that the propeller made ten miles an hour. It affirmatively appears, that, early in the voyage, upon the statement of the captain of the canal-boat, that she was loaded by the head too much, and that her seams that had been above the water were open and let in a little water, the captain of the propeller proposed to land her at or near Weehawken, but that Captain Atkins declined, alleging that he was moving the flour, which was part of his cargo, to the after part of the boat, and that there would be no danger after that change was made. The captain of the propeller then ordered the engineer to run at half speed all night. The engineer testified, that he reduced the steam pressure and

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throttled the engine, so as to reduce the speed fully one-half; that, while in motion, they averaged but five miles an hour, until they got out of the ice; and that they afterwards ran at not over six miles, till the canal-boat was cast-off at Fort Montgomery. Against this evidence there are only vague statements of great speed on the part of the claimants, which are not, in my judgment, sufficient to establish any fault on the part of the propeller in this respect.

In respect to the allegation of want of care in taking the boat in tow, it may be properly answered, that, if there was any original want of care on first starting from the city of New York, no damage appears to have resulted. If the allegation includes the manner of towing during the residue of the voyage, various ways of fastening the barge and canal-boat in different positions seem to have been tried, as one after another seemed to present difficulties, but the fair result of the evidence is, I think, that the propeller was not in fault.

In respect to the ice, it was made that night, and was a mere skim at first. Upon the complaint of the captain of the canal-boat, her place was changed, so that she was astern of the barge, and that astern of the propeller. It was to make this change that the propeller was stopped, and not because she could not make her way through the ice. But the clear proof that the boat was not harmed by the ice is, that, although she made some water from the early part of the voyage, in consequence of the open seams near her bow, it was not until an hour after the ice was passed that Captain Atkins regarded the leak as of any moment. Albertson says the boat began to leak near Haverstraw or Grassy Point, and that up to that time there had been no difficulty from any leak. At this point of time Atkins and Albertson became alarmed, and insisted that the canal-boat should be landed. The people in charge of the propeller, (the canal-boat, as Albertson says, not leaking much then,) made motions indicating that they would land the canal-boat at a dock below Haverstraw; but Albertson declined to land there, he having ascertained that he could not get across the river from that point, and made motions for

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the propeller to go on, and told them to land the boat at Grassy Point. The propeller sheered in to land the canal-boat at that point, and stopped or slowed, but Atkins then declined to cast his boat off. As they came near Fort Montgomery, Atkins hailed the propeller to land the boat, and that it was leaking. Albertson also hailed the propeller to land the boat there. The propeller ran in towards the dock at Fort Montgomery, the engine was stopped, and the canal-boat was hailed to cast off. She was cast off by the hands on board, but one of the lines jammed, and was not unfastened till it was broken by the starting of the propeller. No preparation of lines had been made aboard the canal-boat, her way had been checked by the line which had not been cast off, she was left about 400 feet from the dock, and the tide and wind carried her upward and away from the dock. A boat came to her from the shore, time was lost in getting out her lines, those which were in readiness were not long enough to reach the shore, and the boat from shore had not power enough to tow her. She had lines sufficient to reach the shore, if they had been in readiness. She had no anchor, so that no attempt could be made to hold her. The result was, that she drifted north of the dock, and out into the river, and finally, an hour or more after she was cast off, she sank, having drifted about a mile from the place where the propeller left her.

To the final catastrophe, I think it plain that the fault of the canal-boat contributed, and that to this, as well as to her unseaworthy condition, her loss is due; but I cannot exonerate the propeller from fault, under all the circumstances. It is true, that the usual way of landing boats from a tow, is to sheer in towards the dock and cast off their lines; but, in this case, the persons in command of the propeller knew, at least, that it was owing to something out of the usual course, that the canal-boat desired to land before arriving at her destination, and that she was leaking. This imposed upon the propeller the obligation not to leave her except in safety, or, at least, without some effort to secure her safety. So far from making any such effort, entire indifference seems to have been

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manifested in respect to her condition, and this contributed to the loss. It is quite true that a tug-boat is not an insurer or common carrier, in respect to the boats she takes in tow, but she still remains bound to employ that degree of caution and skill which prudent navigators usually employ in similar cases. (*The Webb*, 14 *Wall.*, 406, 414.) The special contract made by third parties, did not exempt the propeller from that degree of care. I am, therefore, of opinion, that the decree of the District Court was correct in charging the loss of the canal-boat equally to the propeller and to the canal-boat, and making its decree against the propeller for one-half the amount.

The value of the boat was, I think, to be estimated, not as she was after she had been cast adrift by the propeller, but as she was just before that time, while she might still have been saved from sinking by aid from the propeller, and brought to land. In this view, which I understand to be, in substance, that taken by the commissioner and the District Court, in the judgment actually pronounced, I concur in the estimate of value and damage made in the District Court.

Judgment must be rendered accordingly.

James K. Hill, for the libellants.

Robert D. Benedict, for the claimants.

THE NATIVE.

It is too late to object to an appeal where both parties have treated it as valid. A maritime lien exists for supplies furnished to a vessel in a foreign port, which were necessary and were furnished on the credit of the vessel, unless the necessity for such credit be disproved by proper evidence.

A hypothecation of a vessel by her owner, to secure a pre-existing debt, which, in its origin, gave no lien on the vessel, gives no priority to such hypothecation over a prior maritime lien on the vessel.

(Before Johnson, J., Southern District of New York, November 11th, 1876.)

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JOHNSON, J. The decree of the District Court, dismissing the libel, was entered under date of July 14th, 1857, notice of appeal was given and filed July 20th, 1857, a petition of appeal, with a proper bond for costs, was filed August 16th, 1858, and the return of the clerk was filed in this Court September 19th, 1859. A decree of reversal was taken by default, in favor of the libellants, in April, 1872, which was subsequently waived by the libellants. At the last October Term, the claimants, on the cause being moved for hearing, asked to have the appeal dismissed. No steps had ever been taken to set aside the appeal. I think the claimants are too late now to object to the appeal, both parties having treated it as valid.

Upon the merits, it is quite clear that the learned judge who made the decree pursued what was then understood to be the law of the land, as construed by the Supreme Court of the United States, and announced in *Pratt v. Reed*, (19 How., 359.) Since that decision, however, the cases of *The Grapeshot*, (9 Wall., 129,) *The James Guy*, (9 Wall., 758), *The Lulu*, (10 Wall., 192,) and *The Kalorama* and *The Custer*, (10 Wall., 204,) have brought the subject again into discussion, and it is now settled, that a maritime lien exists for supplies furnished in a foreign port, which were necessary and were furnished on the credit of the vessel, unless the necessity for such credit be disproved by proper evidence, as pointed out in the several cases above cited.

The claim of the claimants is based upon an instrument given as security for a debt previously existing against the owner, and not originally incurred on account of the vessel in any respect. It was given by the owner in the port of New York. It engaged the owner absolutely to pay the amount named in it, with interest at seven *per cent.*, in ten days after its date, and by it the owner hypothecates and assigns the vessel, &c., to the claimants, as security for the money named. It declares all risks of the seas, &c., to be for account of the owner, and is in no wise conditioned that any part of the money is put at hazard upon the vessel. For the debt before

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mentioned, the now claimants, the creditors of Cornelius, sued him in the State Court, as a non-resident debtor, and obtained in that suit an attachment against his property; and the hypothecation was given, as the only witness on the subject stated, to satisfy the attachment of the vessel in the common law action. Under the attachment against the owner as non-resident, his interest only in the vessel could be made available for the benefit of the attaching creditor. The earlier maritime lien of the libellants for supplies could not be displaced by such attachment and seizure. The debt on which the attachment was issued was a mere personal demand against the owner. It was, therefore, not in the power of the owner and his creditor, by their mere agreement, to create, without any advance of money or new consideration, a lien which should defeat the existing maritime lien for supplies, by taking precedence over it. Whatever might be the rule in case money had been raised for such a purpose from a third person, the attaching creditor cannot be allowed, by agreement with the owner, to acquire a priority on behalf of a claim which, in its origin, gave no foundation for a lien upon the vessel. (*The Aurora*, 1 *Wheaton*, 96; 1 *Parsons on Sh. & Ad.*, 154; *Greely v. Smith*, 3 *Wood. & Min.*, 236.) Such a hypothecation cannot carry a greater right than a sale of the vessel, and that obviously would not have cut off the prior lien.

There must be a decree for the libellants.

Franklin A. Wilcox, for the libellants.

Ira D. Warren, for the claimants.

The Herbert Manton and The J. H. Gautier.

THE HERBERT MANTON AND THE J. H. GAUTIER.

A steam-tug and a canal-boat lashed to her side are to be regarded, in respect to the duties of navigation, as one vessel, and that a steam vessel.

A tug with a canal-boat so lashed to her must keep the canal-boat out of the way of a sailing vessel, when there is danger of collision between them, and the sailing vessel must keep her course.

The sailing vessel has a right to rely on the observance of the rules of navigation by the tug, and cannot herself safely depart from them.

Judgment as to the motion, or direction of motion, of one vessel, made from another, possesses the utmost uncertainty; for, the tendency is nearly irresistible for the observer to transfer to the other vessel the motion of that on which he stands, and thus to regard the compounded motion of the two as belonging to that one which he is observing.

(Before JOHNSON, J., Southern District of New York, November 11th, 1876.)

JOHNSON, J. On the 28th of November, 1871, between nine and ten o'clock in the forenoon, a collision occurred between the canal-boat Gettysburg, laden with coal, and the schooner Herbert Manton, within about fifty feet from the steamboat wharf at Astoria, Long Island, and a little above the end of Blackwell's Island, whereby the canal-boat and her cargo were lost. The weather was fair, the wind about north-west by north, and the tide the last of the flood, and running about four miles an hour. The canal-boat was lashed to the port side of the steam-tug J. H. Gautier, her bow extending some fifty feet beyond the bow of the tug, and in that position the tug was towing her from Twenty-third street, New York, to the steamboat dock at Astoria. After leaving Twenty-third street, the tug proceeded along up with her tow through the channel between Manhattan Island and Blackwell's Island, until she had reached a point above Blackwell's Island, when she ported her helm and swung around with her head towards Astoria and towards the dock to which she was bound, and where the boat's cargo was to be discharged. The river, at the place where she rounded to, is about one thousand feet wide. The tug, with her tow, was going at the rate of about

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five miles an hour. The pilot of the tug saw the Herbert Manton just as she came around Hallett's Point and had got straightened down. The schooner was then about 600 or 700 feet distant from the tug. He then blew his whistle, but kept on his course, his helm being all the time to port, and his vessel on the swing to starboard until the collision. He did nothing towards keeping out of the way of the schooner. The schooner was bound on a voyage to New York, and, after going through Hell Gate, and having rounded Hallett's Point, was proceeding on with a view to enter the channel between Blackwell's Island and Long Island, just as the tug was swinging around, as before stated, with the port side of the canal-boat towards the schooner. The schooner kept on her course without any change, except as hereinafter stated; and the tug, in attempting to reach her dock, brought the canal-boat right under the schooner's bows, and the schooner struck, stem on, the port side of the canal-boat. The course of the schooner, after rounding Hallett's Point, ranged along Long Island shore, which carried her near the dock at Astoria, where the collision occurred. The schooner changed her course aforesaid after she rounded Hallett's Point, only at the moment of collision and in the jaws of peril, and when a collision was inevitable. She had a competent and proper lookout, and was in all respects properly navigated. At the time of the collision there were a number of vessels in the vicinity, close to the Herbert Manton, and going the same way with her, and the tug-boat J. F. Whitney, with a tow, was approaching from New York, so that the schooner could not have safely luffed to avoid the collision.

It is quite clear, on settled principles, that the canal-boat and the tug to which it was fastened are to be regarded, in respect to the duties of navigation, as one vessel, and that a steam vessel; and that the rules which are to be by law applied to vessels under steam, with a view of securing safety in navigation, are applicable to the tug and her tow lashed to her so as to be governed and controlled by her motions. (*Sturgis v. Boyer*, 24 How., 110; *The Keystone State*, 22 How., 461.)

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Considering the tug and her tow as a steam vessel, the 20th of the Navigation Rules (*U. S. R. S.*, § 4233,) requires, that, when there is risk of collision between a sailing vessel and a steam vessel, the latter shall keep out of the way. The correlative duty is imposed on the sailing vessel, by Rule 23, to keep her course, subject to the qualification stated in Rule 24, that, in construing and obeying the Rule, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from it necessary in order to avoid immediate danger.

The libels allege, and the answers of the schooner admit, that the tug was in fault in turning in to the dock ahead of the schooner, instead of allowing her to pass close between them and the dock, as she otherwise would have done. This ends that question, as between the schooner and the libellants.

In respect to the tug, the evidence is entirely clear, that she held on her course towards the dock, apparently determined to force the schooner to assume her duty of keeping out of the way, while both in fact and in law she might have avoided the collision by stopping and backing, or by yielding the way to the schooner and passing under her stern instead of across her bows. But I do not find that the schooner could have avoided the collision by any act on her part, after it became apparent that the tug was intending not to yield the way. The schooner had a right to rely on the observance of the rules of navigation by the tug; and she could not herself safely depart from them for fear that the tug would fail to observe them, lest she should thereby precipitate the catastrophe which she was striving to avoid. When the law casts upon a steam vessel the general duty and responsibility of avoiding collision with a passing vessel, and a collision nevertheless occurs, the presumption is that the fault is that of the steam vessel. This presumption can only be overcome by proof of fault on the part of the sailing vessel, producing or contributing to the collision. (*Leavitt v. Jewett*, 11 *Blatchf. C. C. R.*, 419.) Now, the only ground of this sort, of any gravity—for I deem the lookout to have been properly kept—consists in the allegation that the schooner, after rounding Hal-

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lett's Point, altered her course, in violation of the Rule before cited. But, as matter of fact, I find this allegation to be unfounded, except at the moment before the collision actually occurred, and when it had become inevitable. Judgment as to the motion, or direction of the motion, of one vessel, made from another, possesses the utmost uncertainty; for, the tendency is nearly irresistible for the observer to transfer to the other vessel the motion of that on which he stands, and thus to regard the compounded motion of the two as belonging to that one which he is observing. I, therefore, give greater weight to the testimony of Captain Crowell of the Herbert Manton, who had the wheel, and says that he did not change the course of the vessel till just at the moment of collision, from the time he got around Hallett's Point, except to steady her to run down channel. By this I understand what is elsewhere referred to in connection with her rounding the Point, as straightening her on her course. Kelly, the mate, confirms the captain, saying that he stood by the captain, by the wheel, and saw no change of course after they rounded the Point. The lookout, E. B. Kelly, says: "I could not see any change in the course of our vessel. After I reported the tug, and before the collision, I thought she kept right along." On cross-examination, he testifies: "After we rounded Hallett's Point we kept a straight course." These witnesses were so situated, at the time of the occurrence, that they had the full means of knowing what was the fact. In my judgment, their testimony outweighs that of others who were not so favorably circumstanced for seeing what took place. In my opinion, the only change of course that took place was that spoken of by the witness Longstreet, who says that the man at the wheel of the Herbert Manton "hove his wheel, first, two or three spokes to the starboard and then to port; a second after that she struck the canal-boat."

The decree of the District Court (5 *Benedict*, 469,) ought to be affirmed, with costs.

Robert D. Benedict, for the libellants.

Edward H. Owen, for the schooner.

Welcome R. Beebe, for the tug.

The Alice Tainter.

THE ALICE TAINTER.

An American built vessel, really owned by residents of New York, was put under the British flag by a formal transfer to a British subject, and was registered in a British port. Afterwards, supplies were furnished to her in New York, by a person who was not misled as to her character: *Held*, that there was no maritime lien on the vessel for the supplies.

(Before JOHNSON, J., Southern District of New York, November 11th, 1876.)

JOHNSON, J. The controlling question in this case is, whether the fact that this vessel was put under the British flag by a formal transfer to a British subject, recorded at the British consulate in New York, and by being registered at Hamilton, in the island of Bermuda, although she was really owned by Smith & Dunning, her original owners, and continued to be controlled by them until they sold her to Slocovitch & Smith, just before the supplies in question were furnished, converted her into a foreign vessel, so as to subject her to a maritime lien for supplies. That the vessel lost her right to the protection of the Government of the United States, by the transaction stated, and that, so far as the revenue laws are concerned, she had no longer any claim to be considered an American vessel, is quite clear. But, all this may be without her being subjected, as a foreign vessel, to a maritime lien for supplies. In respect to that question, the residence of the owners, and not the place of registry or enrolment, controls. (*The Plymouth Rock*, 13 *Blatchf. C. C. R.* 505.) I do not find, upon the evidence, that the libellant was misled in any way in respect to the character of the vessel. He seems to have known her history very well, except that he did not know her owners at the time, nor did he make any inquiry about them. He knew Captain Nichols, who used to come into his office, and who, when he got charge of this vessel, told the libellant that he thought he could give him the order for her supplies, and subsequently did so. The libellant

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testifies that he knew she was under the British flag when he furnished the supplies, and that he furnished them on the credit of the vessel. But this neither makes out that the vessel was not in her home port, nor that he was misled about her in any respect, unless it was in the idea that this change of her colors had caused New York to cease to be her home port. I do not find that the cases to which I am referred support the libellant's view of the law. In most, if not in all, the question presented assumed the vessel to be in a foreign port, and then the inquiry was whether the other circumstances would support a maritime lien. This was clearly so in *The Patapsco*, (13 Wall., 329,) in *The Grapeshot*, (9 Wall., 129,) in *The Guy*, (*Id.*, 758,) in *The Lulu*, (10 Wall., 192,) and also in *The Walkyrien*, (11 Blatchf. C. C. R., 241, and 3 Benedict, 394.) In the latter case, the attempt was, though the vessel was foreign, to defeat the maritime lien on the ground that the foreign owner was a resident of New York, and this the Court refused to do; while, on the other hand, in the early case of *The St. Jago De Cuba*, (9 Wheat., 409,) it was held, that, even in a home port, a vessel may be subjected to the liabilities of a vessel in a strange port, by being falsely held up as foreign by her owners, but that, in such a case, the question is, whether there was an imposition practised, under circumstances calculated to deceive and mislead men of ordinary vigilance.

Entertaining these views of the law, I think the decree of the District Court (5 Benedict, 391,) was correct, and that the further testimony presented in this Court has not altered the position of the case in any material and controlling respect. The decree must be affirmed and the libel dismissed.

Scudder & Carter, for the libellant.

Welcome R. Beebe, for the claimant.

In re D. Colden-Murray and others, Bankrupts.

In re D. COLDEN MURRAY AND OTHERS, BANKRUPTS.

A discharge in bankruptcy was granted by the District Court, June 22d, 1875.

A creditor who had opposed the discharge instituted, on the 15th of November following, proceedings of review. His interest was \$6,000 out of \$300,000 of debts. On the faith of the discharge, the bankrupt, aided by friends, had resumed his former business, and had entered into contracts with a foreign government to transport mails: *Held*, that, as the delay was unreasonable, and had operated to the prejudice of the bankrupt, the petition of review must be dismissed.

(Before JOHNSON, J., Southern District of New York, November 11th, 1876.)

JOHNSON, J. The bankrupts obtained a decree of discharge on the 22d of June, 1875, in the District Court for the Southern District of New York, where they had been adjudged to be bankrupts on the petition of certain of their creditors. Certain of their creditors, namely, the Marine National Bank of the city of New York, C. C. Abel and Christian Bors, now apply to have the decree granting the discharge revised and reversed, upon certain grounds on which they opposed the granting of the discharge by the District Court. The petition of review bears date October 15th, 1875, but appears first to have been brought to the attention of the Court on the 13th of November, 1875, when an order to show cause why the prayer of the petition should not be granted was made. This was served on the attorney for the bankrupts on the 15th of November, 1875, which must, therefore, be taken to be the time of the institution of the proceedings to obtain a review. In excuse for this delay it is alleged, that, on or about the 28th of July, 1875, the papers of the District Court were removed from the old clerk's office in Chambers street to the new Court House, and that, in the removal, the testimony in the case became mislaid and inaccessible to the petitioners, until a period after the time of the application for a review. This very statement, however, makes it obvious that there is nothing in the excuse, because,

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when the application was actually made, the same papers were lacking, and yet their absence did not make it either impossible or difficult to make the application for review. For the absence of these papers the discharged bankrupts were in no sense responsible, and, even if, on the petition of review, it had become necessary for the petitioners to apply for a postponement of the hearing, in order that an opportunity should be afforded to obtain the papers, the bankrupts would have had notice that such an application was pending, and might have governed themselves accordingly. The statute which gives the right to the Circuit Court of general supervision over proceedings in bankruptcy has not fixed any limitation of time within which its interposition must be invoked. In the cases in which appeals are allowed, the time to appeal is fixed at ten days. In the Southern District of Ohio, the Circuit Court adopted an express rule limiting the time for a petition of review to ten days, or such further time as might be allowed by the District Judge, by an order made within the ten days. (2 *Gazzam's Bank. Dig.*, 1128.) In the Supreme Court of the United States, in *Bank v. Cooper*, (20 *Wall.*, 171,) that Court declared that the review must be sought within a reasonable time, which should generally be fixed with reference to the analogy furnished by the period fixed for appeal. In the case of *Littlefield v. Delaware & H. Canal Co.*, (3 *Clifford*, 371,) Judges Clifford and Shepley, in the Circuit Court for the District of Massachusetts, say: "Discharge was denied on the 12th of May, 1869, and the petition was filed on the 30th of June in that year. Special injury is neither alleged or proved, and the Court is of the opinion, in view of all the circumstances, that the petition ought not to be rejected because it was not filed at an earlier day. Until some rule is adopted on the subject, the Court will not deprive the petitioner of a hearing on that ground, unless the delay is manifestly unreasonable, or has operated to the prejudice of the respondent." (*Bump on Bankruptcy*, 8th ed., p. 351.) The present case is, in my opinion, such a one as is contemplated in the opinion cited. The discharged bankrupts had a

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right to assume, in the absence of any notice to the contrary, that their discharge, although it had been opposed, was acquiesced in by their creditors. Acting on this basis, they have, with the assistance of their friends, engaged again in the business of shipping merchants, in which they had previously been engaged, and have entered into, and are performing, important undertakings, of a *quasi* public nature, in respect to the transportation of the West India mails, with a foreign Government. Now to revoke the discharge which was granted to them in the regular course of the administration of the bankrupt law, would involve in misfortune, not only themselves, but others who, relying on their discharge, have aided them or entered into new business relations with them. Under these circumstances, and advertng, also, to the small interest of the objecting creditors compared to the total amount of their debts, some six thousand dollars out of at least three hundred thousand dollars, I think the discretion of the Court will be wisely exercised in refusing to entertain the application for a review. The petition is, therefore, dismissed.

Austin G. Fox, for the creditors.

John Sherwood, for the bankrupts.

The Metropolitan Wringing Machine Company v. Young.

THE METROPOLITAN WRINGING MACHINE COMPANY

vs.

JAMES YOUNG AND OTHERS. IN EQUITY.

The first claim of the reissued letters patent, division A, granted to the Metropolitan Washing Machine Company, January 7th, 1873, for an "improvement in clothes wringers," (the original letters patent having been granted on the invention of Alby H. Page, January 29th, 1867,) namely: "In a wringer having a pair of squeezing rollers, and an operating crank, and two uprights or standards, the employment of clamping means arranged to take hold of the tub at or near the base of each standard," is limited to a combination in which a swivel, or its equivalent, is employed as one of the parts of a clamping device, and must be read with reference to the specification, and as though the words "substantially as described," were inserted.

(Before WALLACE, J., Northern District of New York, November 18th, 1876.)

WALLACE, J. The complainants are the owners of letters patent originally issued, on the invention of Alby H. Page, January 29th, 1867, for an "improvement in clothes wringers," and reissued to the Metropolitan Washing Machine Company, January 7th, 1873, in three divisions. The improvement relates to a device for fastening the wringers to tubs of various sizes. Infringement is predicated upon the first claim only in the reissued patent, division A, the other claims having been abandoned on the argument. That claim reads as follows: "In a wringer having a pair of squeezing rollers, and an operating crank, and two uprights or standards, the employment of clamping means arranged to take hold of the tub at or near the base of each standard." The defendants rely upon three defences to the action, insisting, first, that Page, the inventor of the alleged improvement, had abandoned it to the public; second, that, if the claim is construed to cover all clamping devices for such machines, it is void for want of

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novelty ; and, third, that, if the claim is limited to clamping devices of the particular character described in the specification and shown in the drawings, the defendants do not infringe. I do not deem it necessary to pass upon any but the last of these defences. In my view, the true construction of the patent limits the claim to a combination of the machine with a clamping device of a specific construction, which the defendants have not adopted. Construing the claim as favorably as its language, the state of the art, and the extent and character of the actual invention will permit, it must be limited to a combination in which a swivel, or its equivalent, is employed as one of the parts of a clamping device. It cannot be sustained as a broad claim for any kind of "clamping means arranged to take hold of the tub at or near the base of each standard" of the wringing apparatus. It is to be read with reference to the specification, and as though the words "substantially as described" were inserted. It is conceded, that all that Page contemplated was to effect a new organization of the clothes wringers in use, by combining wringing apparatus similar to that in the Allendar machine with a device for clamping it to tubs and vessels, so that the wringing apparatus could be adjusted, without further adaptation, to tubs and vessels of different forms and sizes, and detached at pleasure. Prior to his first application for a patent, the most popular wringing machines were a part of the vessel itself, or were made part of a bench or frame. Wringers of various construction had been made to be attached to a tub or other vessel, but none like the Allendar machine had been made which could be adjusted in a satisfactory way to tubs and vessels differing in size and form. It was the aim of Page to supply this want. Clamping devices were a well known means of fastening machines to chairs, benches, platforms, tables and other articles. The combination of a well known wringing apparatus with a tub or vessel, by means of a well known clamping device, would not be patentable, unless some new and useful result due to the combination would ensue. It is difficult to see how any new result, in a patentable sense, could

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follow from combining the wringing apparatus with a device for fastening it upon a tub, unless there should be something in the device peculiarly adapted to co-operate with the wringing apparatus. Such a result would not follow from the employment of an ordinary clamp, or of two, one at or near the base of each standard of a wringer with two standards. Nor would it necessarily follow because the clamping device might be such as to adapt the wringing apparatus to tubs of different sizes; because, the aggregation of devices, each of which is old, so that each may work out its own effect, without the production of something novel arising from the co-operation of the devices, is not a new result. Clamps are usually placed at the point which will give the greatest stability to the machine. This may be near the base of the support of the machine. If there are two supports, it is quite possible that a clamp on one may suffice to attach the machine sufficiently. If it does not, and two are used, the result is but an aggregation of the results due to each. These considerations lead, in ascertaining the extent of the actual invention of Page, to search for it in some distinctive feature of his clamping device, which, from its peculiar co-operation with the wringing apparatus, produces the new result which renders his invention patentable. The description in the patent and the drawing both exhibit a clamping device which consists of two curved bars having three vertical fingers, two of which proceed from each end of the bar, on one side of it, and one from the centre, but on the opposite side of the bar. The latter finger has a set screw passing through it, with a small button on its end. Each bar is pivoted to a small bracket by a stud, and the brackets are fastened to the upright, near its base, on the side or front. When the bars are clamped to the tub by adjusting the bar by means of the pivot, four of the six fingers are placed on the outside of the tub, and two, those having the set screw, on the inside. The set screw is then adjusted, and thereby the uprights are rigidly attached to the tub. The specification proceeds as follows: "This construction presents a swivel or joint, which allows each clamping device to turn,

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and thus adapt itself perfectly to tubs and washing machines of different sizes and forms. The employment of two sets of clamping devices, and the taking firm hold on the edge of the tub at points so far removed from each other, provides for very effectually resisting the tortional strain" (caused by operating the crank.) Language could hardly be plainer to indicate that the swivel is deemed an important part of the contrivance. It is also obvious, from the whole mechanism of the clamping device, that the pivot is the controlling factor in the construction; and I am unable to see what equivalent could be employed in its place, without requiring a radical change in the entire device. Without the pivot there could be no swivel, and the vertical fingers could not be placed in the required position.

Turning to the application for the original patent, it is clear that Page considered the swivel as the important feature of his invention; for, he concludes his description by stating that "the *advantage* of this arrangement *consists* in the employment of a *swivel* or *joint*, which allows the clamping device to turn, and thus adapt itself perfectly to tubs of different sizes and forms." This terse statement of his idea is quite ingeniously diluted in the language of the reissue. In the original he summarizes his invention as one wherein "the *advantage* of his *arrangement* *consists* in the employment of a swivel," while, in the reissue he says: "This construction presents a swivel." In the first, the employment of the swivel is stated as the gist of the improvement. In the reissue the attempt is to present it as a secondary or cumulative advantage. I cannot resist the belief, in view of the decided difference between the claims in the original and the reissue, and of the changes in the description, that it was intended to import vagueness and generality into the reissue, to obscure somewhat the cardinal idea of the inventor. Enough, however, remains to show that the reissue describes the same invention as did the original, and that the swivel cannot be discarded, but must be regarded as one of the controlling elements in the combination.

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Assuming that the patent covers a combination which is the proper subject of a patent, either because a new result is produced, or because the clamping device is new, the claim in question has not been infringed by the defendants' structure. In their structure, the wringer is clamped to the tub by two jaws attached by a spring connection, one to either standard, having a thumb-screw passing through either jaw and screwing into a piece of metal imbedded in either standard. The wringer may be set upon the edge of the tub, the jaws at the base of each standard being placed outside of the tub, and the standards upon the inside and opposite the jaws, and, by means of the thumb-screw, the jaws are moved towards the standard, thus firmly clamping the wringer upon the tub between the jaws and the standard. Quite evidently, this is a simpler and more convenient and less expensive device than the complainants'. The swivel is discarded, the curved bars which are useless without the pivot are discarded, and the standards are utilized to supply the place of four of the vertical fingers on the bars. The contrivance of the defendants is so far different from that of the complainants that it amounts to a substantive invention. This is quite conclusive against the theory of infringement. Indeed, it was substantially conceded, upon the argument, that, if the swivel should be held to be an essential part of the combination covered by the claim, the defendants' structure is not an infringement.

A decree is ordered for the defendants, dismissing the bill, with costs.

Charles L. Woodbury, Benjamin F. Thurston, and Livingston Scott, for the plaintiffs.

John F. Seymour and Edmund Wetmore, for the defendants.

Raymond v. The United States.

CHARLES H. RAYMOND, PLAINTIFF IN ERROR

vs.

THE UNITED STATES OF AMERICA, DEFENDANTS IN ERROR.

To an action of debt, brought by the United States, on the bond of a surety for a paymaster in the navy, the defendant pleaded matters which amounted to allegations of laches on the part of the United States in their dealings with the paymaster, and also that the defendant had revoked his bond: *Held*, that the pleas were bad.

The provision in § 1047 of the Revised Statutes, (formerly § 4 of the Act of February 28th, 1839, 5 *U. S. Stat. at Large*, 322,) that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained, unless commenced within five years from the time when the penalty of forfeiture accrued, relates to penalties and forfeitures incurred by infractions of the law, and does not relate to the penal sum named in a bond.

(Before JOHNSON, J., Southern District of New York, November 18th, 1876.)

JOHNSON, J. This is a writ of error to the District Court, to review a judgment given in that Court, for the United States, in an action of debt upon bond, upon a demurrer to the pleas of the defendant in that Court, who is now plaintiff in error.

The first of these pleas sets up, as a defence, that Giraud, the paymaster for whom the defendant gave the bond in suit, as surety, obtained from the Navy Department a leave of absence for three months, and that, in communicating this leave, the proper officer of the Department added, referring to a previous direction of the Department to Giraud, to render his accounts for settlement as early as practicable: "As you cannot have access to your books and papers on board the *Saratoga*, the time for the settlement of your accounts will necessarily be delayed." The defendant avers, that, thereby, the plaintiffs lost the moneys then and thereafter in the hands of Giraud.

The second plea avers, that, at a subsequent time, Giraud

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was possessed of moneys sufficient to meet the demands of the plaintiffs, and was squandering the same, and that the defendant notified the Secretary of the Navy and the Postmaster General thereof, and demanded that they should cause Giraud to be arrested and obtain from him the moneys due the plaintiffs; that they promised the defendant to do so, but did not; and that, by reason of this negligence on the part of the plaintiffs, their loss occurred.

In respect to the first of these pleas, the averment falls short of showing any agreement for time, binding upon the United States. They might at any time have proceeded against Giraud, and he could not have availed himself of the letter from the Department as a legal bar to such proceeding. The supposed defence is, therefore, reduced, in the case both of the first and second pleas, to that of laches on the part of the United States. Repeated adjudications have settled that laches cannot, even in favor of a surety, be alleged against the Government. (*U. S. v. Kirkpatrick*, 9 *Wheaton*, 720, 735; *U. S. v. Van Zandt*, 11 *Id.*, 184; *U. S. v. Nicholl*, 12 *Id.*, 505; *U. S. v. Minturn*, 21 *Int. Rev. Rec.*, 182; *Jones v. United States*, 18 *Wall.*, 662.) These pleas were correctly adjudged to be bad.

The third plea avers, that, on the 10th of May, 1870, the defendant surrendered and delivered up Giraud to the plaintiffs and revoked his bond; that the plaintiffs accepted the surrender; and that thereby the obligation of the defendant was discharged and cancelled. The bond is not conditioned to be void on the surrender of Giraud to anybody, nor is it perceived how the defendant can revoke his bond by his own act. The plea is, plainly, bad.

The last plea is, that the action did not accrue to the plaintiff within five years next before the commencement of the suit. No statute limiting the right of action upon a bond to five years has been referred to. The 4th section of the Act of February 28th, 1839, (5 *U. S. Stat. at Large*, 322,) which now forms section 1047 of the Revised Statutes, is relied upon. That section provides, that "no suit or prosecution for

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any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained, unless commenced within five years from the time when the penalty or forfeiture accrued. This relates to penalties and forfeitures incurred by infractions of the law, and applies as well to suits as to other forms of prosecution therefor; but a civil action upon a bond grows out of contract, whether it be in favor of the United States or of a private person. A penal sum, named in a bond, is not a penalty, within the statute, and it does not accrue under the laws of the United States, but under the contract of the party.

The judgment must be affirmed.

William H. Arnoux, for the plaintiff in error.

George Bliss, (*District Attorney*), for the defendant in error.

DOUGLASS F. MALTBY AND OTHERS

vs.

ANGUS L. BOBO. IN EQUITY.

The fact that a defendant who has sold an article which infringes on a patent, sold it on behalf of its owner, and had no interest in it, or in its sale, is no ground for refusing to grant an injunction against him.

(Before JOHNSON, J. Southern District of New York, November 18th, 1876.)

JOHNSON, J. The plaintiffs' bill of complaint contains all the averments of fact to make out their right and the infringement thereof by the defendant. The facts are verified by the usual oath. The right of the plaintiffs is further supported by affidavit, showing that the plaintiffs have obtained against

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another defendant, in this Court, an interlocutory injunction, and that, after some litigation, that defendant submitted to a decree. Upon this state of the case an injunction is moved for. The defendant presents no denial of any of the alleged facts, by affidavit or otherwise, but only alleges, by way of plea, that, in selling the nail pullers mentioned in the bill, he was acting as salesman for one Dickerman, the owner of the nail-pullers, and that he had no interest in the nail-pullers, or in the sale of them, except as the employee of Dickerman, to dispose of the same. The plea has been set down for argument, but has not yet been heard ; but I do not understand, that any absolute rule of practice prevents the granting of an injunction in such a case. It is, of course, necessary to look at the sufficiency of the plea, which I regard as presenting no defence to the bill. A wrong-doer cannot set up that he is doing wrong on account of a third person, as a bar to his own responsibility. The principal, also, may be liable, if the injured party elects to look to him ; but the person who is actually doing the wrong cannot escape liability. Inasmuch, therefore, as the case made by the bill is wholly undefended, and as the plea states the fact which is, in law, an infringement, an injunction must be granted.

Francis Forbes, for the plaintiffs.

Andrew J. Todd, for the defendant.

The United States v. Claflin.

THE UNITED STATES, PLAINTIFFS IN ERROR

vs.

HORACE B. CLAFLIN AND OTHERS, DEFENDANTS IN ERROR.

The decision of the Supreme Court in *Stockwell v. The United States*, (13 Wallace, 531,) was, that the 4th section of the Act of July 18th, 1866, (14 U. S. Stat. at Large, 179,) did not effect such a repeal of the 2d section of the Act of March 3d, 1823, (3 Id., 781), as took away the right of the United States to proceed under said 2d section, upon a cause of action which arose before the Act of 1866 took effect.

As to causes of action falling within the terms of the 2d section of the Act of 1823, which arose after the passage of the Act of 1866, and before the passage of the Revised Statutes of the United States, no suit can be maintained brought after the passage of the Revised Statutes.

No recovery can be had under said 2d section in respect of any acts done after the enactment of the Revised Statutes.

The fine provided for in § 4 of the Act of 1866, which is substantially identical with § 3082 of the Revised Statutes, cannot be recovered in a civil action, but must be imposed after a conviction on a trial for a crime.*

(Before JOHNSON, J., Southern District of New York, November 29th, 1876.)

This was a writ of error to the District Court, which Court had sustained demurrers to the declaration. The opinion of the District Court (BLATCHFORD, J.,) was as follows :

“It is quite clear that the 2d section of the Act of March 3d, 1823, (3 U. S. Stat. at Large, 781,) must be regarded as having been repealed by § 5596 of the Revised Statutes, (even if it had not been previously repealed,) on the ground that some portion of that Act is embraced in the Revised Statutes, the provisions of the 1st section of that Act being embraced in § 3099 of the Revised Statutes, and the provisions of the 2d section of that Act not being embraced in any section of the Revised Statutes. The effect of such repeal is to

* The decision in this case was affirmed by the Supreme Court, on writ of error, December 2d, 1878.

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destroy the right of the plaintiffs to recover under said 2d section in respect of any acts done after the enactment of the Revised Statutes. Therefore, counts 7, 9, 11 and 13 of declaration No. 2 are bad.

By § 5597 of the Revised Statutes, it is provided, that the repeal of the several Acts embraced in the Revised Statutes shall not affect any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under the said Acts shall continue, and may be enforced in the same manner as if said repeal had not been made; and, by § 5598, it is provided, that, all offences committed, and all penalties or forfeitures incurred under any statute, embraced in the Revised Statutes, prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made. Thereupon, the question arises, whether the 2d section of the Act of 1823, on which the counts for double the value of the imported goods are founded in these cases, was in force at the time of the enactment of the Revised Statutes, or whether it had been superseded and virtually repealed by the enactment of the 4th and other sections of the Act of July 18th, 1866, (14 *U. S. Stat. at Large*, 179.) It was decided by the Supreme Court in *Stockwell v. The United States*, (13 *Wallace*, 531.) that the penalty of double the value of the imported goods, imposed by the 2d section of the Act of 1823, was not repealed by the 4th or any other section of the Act of 1866. This decision was made at the December Term, 1871. Yet, the 2d section of the Act of 1823 is not found in the Revised Statutes, and, as has been shown, must be regarded as having been repealed by § 5596 of the Revised Statutes, even if it were not previously repealed. What is the effect of the omission to include it in the Revised Statutes? Section 5595 of the Revised Statutes declares, that the revision embraces the general and permanent statutes which were in force on December 1st, 1873, as revised and consolidated by the Commissioners; and section 5596 declares, that all parts of Acts passed prior to December 1st, 1873, which

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are not contained in the Revised Statutes, have been repealed or superseded by subsequent Acts, or were not general and permanent in their nature, and that all Acts passed prior to December 1st, 1873, no part of which is embraced in the Revised Statutes, shall not be affected or changed by the enactment of the Revised Statutes. As was pointed out by the Circuit Court for this District in *In re Stupp*, (12 *Blatchf. C. C. R.*, 501, 523,) the purport of the foregoing provision of section 5596 is, that, if any portion of a particular Act is embraced in any section of the Revised Statutes, the parts of the same Act which are not contained in the revision have been repealed or superseded by subsequent Acts, or were not general and permanent in their nature, but that, if there be an entire permanent and general statute which was in force on the 1st of December, 1873, and no part of it is to be found in the Revised Statutes, it is to be regarded as still in force. As a portion of the Act of 1823 is embraced in § 3099 of the Revised Statutes, and as the provisions of the 2d section of that Act are not contained in the Revised Statutes, and as those provisions were general and permanent in their nature, it follows, that Congress has declared by § 5596, that the provisions of the 2d section of the Act of 1823 were repealed or superseded by a subsequent Act. This declaration was made by Congress after the decision in *Stockwell v. The United States* was made, and in view of that decision; because, the only subsequent provisions of law by which the 2d section of the Act of 1823 could have been, or were claimed to have been, repealed or superseded, were the provisions of the 4th section of the Act of 1866, in connection with the provision of the 43d section of that Act, repealing all parts of Acts conflicting with or supplied by the Act of 1866, and the provisions of the 4th section of the Act of 1866 are found embodied in § 3082 of the Revised Statutes, and, in the marginal note to that section, the case of *Stockwell v. The United States*, (13 *Wallace*, 531,) is referred to.

The force of the legislative declaration contained in § 5596 of the Revised Statutes, in respect to this subject, has been

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recognized by the Supreme Court in two cases. In *Murdock v. City of Memphis*, (20 *Wallace*, 590, 617,) the question arose as to whether any part of the 25th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 85,) remained in force after the enactment of the 2d section of the Act of February 5th, 1867, (14 *Id.*, 386,) or whether the later section had taken the place of the prior one, there being no express repeal of the prior one. Other provisions of the Act of 1789 are incorporated in the Revised Statutes, but the 25th section of that Act is not incorporated in them, and the 2d section of the Act of 1867 is incorporated in them. The Court came to the conclusion that the 25th section of the Act of 1789 was technically repealed, and that the 2d section of the Act of 1867 had taken its place, although the Act of 1867 had no repealing clause, nor any express words of repeal. The opinion of the Court then proceeds: "This view is strongly supported by the consideration, that the revision of the laws of Congress, passed at the last session, based upon the idea that no change in the existing law should be made, has incorporated with the Revised Statutes nothing but the 2d section of the Act of 1867. Whatever might have been our abstract views of the effect of the Act of 1867, we are, as to all the future cases, bound by the law as found in the Revised Statutes, by the express language of Congress on that subject; and it would be labor lost to consider any other view of the question."

In the case of *Smythe v. Fiske*, (23 *Wallace*, 374,) the Supreme Court, in construing certain sections of tariff Acts passed in 1842, 1846 and 1864, refers to the manner in which those sections, as reproduced in the Revised Statutes, are worded, and says that such wording is "a legislative declaration that such was the state of the law on the 1st of December, 1873," that is, prior to the enactment of the Revised Statutes, and "is necessarily a construction of the last clause of the 8th section of the Act of 1864, in accordance with that which we have given to it," and that "it was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions."

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In accordance with these views it must be held, that the omission to enact in the Revised Statutes the 2d section of the Act of 1823, while another portion of that Act is enacted in the Revised Statutes, is a legislative declaration by Congress, that, on the 1st of December, 1873, and prior to the enactment of the Revised Statutes, the 2d section of the Act of 1823 was not in force, but had been repealed or superseded. It could have been repealed or superseded only by the Act of 1866; and it must be held that Congress has declared, by statute, that, notwithstanding the decision of the Supreme Court in *Stockwell v. The United States*, the 2d section of the Act of 1823 was superseded by the Act of 1866, and was not in force after the Act of 1866 was enacted.

The authority of Congress to declare, by statute, the existing state of statutory law, has been recognized and upheld by the Supreme Court. In *Bailey v. Clark*, (21 *Wallace*, 284,) the question arose as to the meaning of the words "capital employed" by banks or bankers, in the 110th section of the Internal Revenue Act of June 30th, 1864, as amended by section 9 of the Act of July 13th, 1866, (14 *U. S. Stat. at Large*, 136,) as applicable to questions of taxation which arose in 1869 and 1870. Congress, by § 37 of the Act of June 6th, 1872, (17 *Id.*, 256,) enacted that the words "capital employed," in such 110th section, "shall not include money borrowed or received from day to day, in the usual course of business, from any person not a partner of, or interested in, the said bank, association or firm." In reference to this enactment, the Court says: "This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute, and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising, it would undoubtedly have so provided in terms."

The question thus presented, as to whether causes of action falling within the terms of the 2d section of the Act of 1823, and which arose prior to the enactment of the Revised Statutes, on the 22d of June, 1874, can be prosecuted on or after

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the latter date, has been heretofore ruled by me in favor of such prosecution, on the ground that the Supreme Court had held that the Act of 1866 did not repeal the 2d section of the Act of 1823. But the views above presented as to the effect of § 5596 of the Revised Statutes, in the particulars referred to, were not as fully considered as they now have been. It follows, that all the odd numbered counts, in both of the declarations, must be held bad.

As to the even numbered counts, all those in suit No. 1, and counts 2, 4 and 6 in suit No. 2, are founded on § 4 of the Act of 1866, while counts 8, 10, 12 and 14 in suit No. 2 are founded on § 3082 of the Revised Statutes. These sections are substantially identical. It was decided by the Supreme Court, in *Stockwell v. The United States*, that the 4th section of the Act of 1866 was designed to punish as a crime that which before had subjected an offender to only civil liability or *quasi* civil liability. Besides the forfeiture of the offending merchandise, the only penalty imposed is, that the offender shall be fined in a sum not exceeding \$5,000, nor less than \$50, *or* be imprisoned for any time not exceeding two years, *or* both. This fine is manifestly a fine not to be recovered by a civil action, but to be imposed after a conviction on a trial for a crime, as a punishment for which the Court may, in its discretion, inflict imprisonment, either with or without the imposition of a fine. No such imprisonment can be inflicted as the result of a civil action.

Moreover, this is an action of debt, and, in each of the even numbered counts, the plaintiffs claim the sum of \$5,000 as a debt. But the statute does not impose a penalty or fine of \$5,000, or of any other definite sum, or of any sum which can be reduced to a certainty otherwise than by the discretion of the Court in fixing such sum after a verdict on a trial. There can be no verdict for any definite sum. Debt lies only when a sum certain is due to the plaintiff, or a sum which can be reduced to a certainty, so as to form the basis of a verdict in favor of the plaintiff for a sum certain.

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It follows, that all the even numbered counts are bad.
The demurrers are sustained."

George Bliss, (District Attorney,) for the plaintiffs in error.

William M. Evarts and Elihu Root, for the defendants in error.

JOHNSON, J. After examining the case of *Stockwell v. The United States*, (13 Wall., 531,) I am constrained to think that the Supreme Court did not intend to hold that the second section of the Act of March 3d, 1823, there in question, was not, to any intent, repealed by the 4th section of the Act of July 18th, 1866, but only that no repeal was thus effected which took away the right of the United States to proceed under the former section, upon a cause of action which arose before the Act of 1866 took effect. That was the case which stood for judgment, as matter of fact, and that was the limitation stated at the end of the prevailing opinion of the Court. The general tenor of the argument would seem to lead to the broader conclusion, that no repeal, in any sense, was effected by the Act of 1863; but this rather strengthens the force of the limitation upon the conclusion, which was expressed, certainly not by any accidental phrase, in the opinion of the Court. It is true, that we are left without any indication of the ground of the discrimination. That, however, is not necessary to be ascertained for the purpose of the present case; for, so far as the question of the repeal of the Act of 1823 may be supposed to affect transactions occurring before the passage of the Revised Statutes and after that of the Act of 1866, that question seems to be controlled by the provisions of the Revised Statutes. In the views expressed by Judge Blatchford, and upon the grounds stated by him on this point, I concur.

In this connection, it ought to be observed, that, quite evidently, the views expressed by Judge Blatchford were those entertained by the commissioners to revise the statutes, and

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by the Congress which enacted them. The commissioners reported to Congress, in their draft of the revision, both section 4 of the Act of 1866 and section 2 of the Act of 1823, consolidated into one section. (*Revision of the United States Statutes, as drafted by the Commissioners appointed for that purpose, title 36, ch. 10, § 636, vol. 2, p. 1480.*) This appears to have been done by the commissioners, not because they so construed the law, but because of the supposed effect of the Stockwell case, to which they refer in a foot-note to the proposed section. The section, as reported by the revisers, is as follows, (a note, which accompanies it, stating that the words in *italics* are new, and the words in brackets are found in the existing law, but are recommended to be omitted): "Sec. 636. If any person shall fraudulently or knowingly bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise, after importation, knowing the same to have been imported contrary to law, *double the value of* such merchandise shall be forfeited, [and] *or* the offender shall, [on conviction thereof before any Court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such Court] *be punishable by a fine of not more than five thousand dollars nor less than fifty dollars, or by imprisonment for not more than two years, or both.*" The revisers' foot-note to this section is as follows: "Section 2 of the Act of 3 March, 1823, ch. 583, Stat. at L. 781, is substantially incorporated in the text, pursuant to the decision in 13 Wall., 531. It provided 'that, if any person or persons shall receive, conceal, or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any Act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so received, concealed or purchased.'" Congress, with

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the whole subject thus fully spread before it, and the question of the scope and effect of the decision in the Stockwell case thus fairly and formally presented, struck out from this proposed section all that was incorporated into it from the Act of 1823, and left in § 3082 of the Revised Statutes only the provisions of the Act of 1866, with slight verbal alterations.

Upon the other sets of counts I do not think it necessary to add anything.

The judgment must be affirmed.

GEORGE A. FELLOWS

vs.

UZZIAH C. BURNAP, ASSIGNEE IN BANKRUPTCY OF FRANCIS
MANY AND JAMES MARSHALL.

The filing in this Court, under General Order No. 26 in Bankruptcy, by a creditor in bankruptcy, of an appeal from a decision rejecting his claim, and of a statement of his claim, within ten days after giving notice of his intention to enter his appeal, are not jurisdictional requisites, and, if the requirements of § 4981 of the Revised Statutes in regard to the notice and bond on such appeal are complied with, this Court has power to relieve the creditor from any consequences of not filing such an appeal and statement within such ten days.

Before JOHNSON, J., Southern District of New York, November 29th, 1876.)

JOHNSON, J. This is a motion to dismiss the appeal of an alleged creditor of a bankrupt from a decision of the District Court expunging his claim as against the joint estate of the bankrupts, but allowing it to stand as against their separate estates. The order embodying this decision was entered June 21st, 1876. Under the statute, (*Rev. Stat., sec. 4981*), the creditor had ten days in which to take certain necessary steps in compliance with the requirements of that section, to effect an appeal. The statute is very specific and peremptory in re-

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gard to these steps. It says: "No appeal shall be allowed in any case from the District to the Circuit Court," unless three specified things are done within ten days after the entry of the decree or decision appealed from. In this case, each of these prescribed steps were taken within that time. The appeal was claimed and notice given to the assignee and to the clerk, and the requisite bond was given, approved and filed, within the ten days. If these steps are wanting, jurisdiction is not acquired by the Circuit Court. (*In re Coleman*, 7 *Blatchf. C. C. R.*, 192; *Sedgwick v. Fridenberg*, 11 *Id.*, 77; *Wood v. Bailey*, 21 *Wall.*, 640.)

Sections 4982 and 4984 provide that the appeal so taken shall be entered at the next term of the Circuit Court for the District, held after the expiration of ten days from the time of claiming the appeal, and that, on so entering the appeal in the Circuit Court, the appellant must file in the clerk's office of that Court a statement of his claim, substantially as in a declaration at law. No. 26 of the General Orders in Bankruptcy seem to impose a narrower limit of time upon the appellant. It requires him to give notice of his intention to enter the appeal within ten days from the entry of the final decision of the District Court, and to file his appeal in the clerk's office of the Circuit Court within ten days thereafter, setting forth a statement in writing of his claim, as prescribed by the law.

In this case, the bond was filed on the 24th of June, and the notice of appeal was given to the District clerk on the 26th of June, as sworn by the person who filed it, although the file mark on the original paper is June 24th. The appeal and statement required were filed in the clerk's office of the Circuit Court on the 6th of July, within ten days from the time of filing the notice of appeal, if that was filed on the 26th of June. But, whether it was or not is, in my opinion, not vital to the rights of the appellant. If there was a failure, it was not in a matter going to the jurisdiction of the Court. The party, beyond all question, intended to proceed in time, and supposed himself to be in time. The office register showed

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the 26th as the day of filing the notice of appeal, and, counting from that day, the 6th of July was in time. Such a slip, if it be a slip, will, of course, be corrected. The excuse is sufficient to warrant relief, in any matter which does not go to the jurisdiction of the Court. The motion to dismiss must be denied.

George A. Black, for the plaintiff.

William B. Hornblower, for the defendant.

ANN JANE MACKAY, ADMINISTRATRIX, &C., OF LOUISA S.
MACKAY, DECEASED

vs.

THE CENTRAL RAILROAD OF NEW JERSEY.

An administratrix, appointed in New York, sued in this Court a New Jersey corporation, to recover, for the benefit of the next of kin of the intestate, damages for the death of the intestate, caused by the negligence of the corporation, the right of action being claimed under a statute of New Jersey: *Held*, that the action could not be maintained.

(Before SHIPMAN, J., Southern District of New York, December 1st, 1876.)

SHIPMAN, J. The complaint in this case alleges, that, on April 23d, 1874, Louisa S. Mackay died, and subsequently letters of administration upon her estate were duly granted to the plaintiff, a resident of the city of New York, by the surrogate of the county of New York; that the plaintiff duly qualified, and entered upon the discharge of the duties of said office; that the defendants are a corporation created under the laws of the State of New Jersey, and are common carriers of passengers between the cities of New York and Jersey City; and that, on April 23d, 1874, they received Louisa S. Mackay,

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in New York, into one of their ferry-boats, as a passenger, to be transported to Jersey City, and so unskillfully conducted themselves, that, in consequence of their negligence, she fell between the end of the boat and the pier at Jersey City and was drowned. The complaint further alleges, that, by an Act of the Legislature of New Jersey, passed March 3d, 1848, it was provided as follows: "1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, and the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property by persons dying intestate, and, in every such action, the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: *Provided*, that every such action shall be commenced within twelve calendar months after the death of such deceased person."

After the jury was impaneled, and before any evidence was taken, the defendants moved to dismiss the complaint, because the plaintiff, as administratrix in the State of New York, and appointed solely under its laws, has no power or authority, by virtue of the statute of the State of New Jersey, to sue for and recover damages for the death of the intestate—a question which, it was conceded by the plaintiff, is clearly presented upon the pleadings.

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It is manifest, that the right of an administrator to recover for the pecuniary injuries resulting from the death of the intestate to the widow and next of kin, is unknown to the common law, and exists only by statute. It has been held that such a statute has no extra territorial force, and that no recovery can be had thereon for an injury which was committed beyond the limits of the State by whose Legislature the statute was enacted. (*Whitford v. Panama R. R. Co.*, 23 N. Y., 465; *Beach v. Bay State Co.*, 30 Barb., 433.)

The alleged injury in this case was received in New Jersey, and the question which arises, is, whether a New York administrator can, by virtue of his appointment by the surrogate of the county of New York, recover the damages which a personal representative is authorized to sue for and obtain for the benefit of the widow and next of kin, by the statute of the State of New Jersey, and not by the law of the State of New York.

“An administrator takes his title by force of the local law, and the grant of administration.” (*Marcy v. Marcy*, 32 Conn., 308.) A New York administrator exists by virtue of his appointment under the laws of that State, and his powers and duties are prescribed by its statutes. Another State cannot impose upon him liabilities, obligations, or duties, different from those which the laws of New York impose, for he takes upon himself such obligations only as the laws of the State which appointed him create. Neither can the statutes of another State impart to the New York administrator powers which the New York statutes do not confer. He is the creation of the local law, and, until additional authority is derived by virtue of an additional appointment, he has only the power which the local law confers.

The right which the plaintiff is supposed to have received by the statute of New Jersey, is not a right to any property which are the assets of the deceased, or of her estate, but is a right to sue as trustee of a fund which may be obtained for the next of kin—a position in which she is not placed by the laws under which she was appointed. In order to execute

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such a trust, the trusteeship must have been conferred; and the only title which the plaintiff has acquired to this trusteeship is by virtue of her appointment as administratrix, by the surrogate under the laws of New York. Its laws do not confer upon the representatives of deceased persons any power to obtain damages for injuries resulting in death which the deceased received in another State.

This question has been considered by the Supreme Courts of Massachusetts and of Ohio. In *Richardson v. N. Y. Central R. R. Co.*, (98 *Mass.*, 85,) a Massachusetts administratrix sued a New York corporation for damages by reason of the death of the plaintiff's intestate through the negligence of the defendants in New York. The right to sue was founded upon a New York statute, which is very similar to the New Jersey statute. The Court say: "The plaintiff is the administratrix appointed under the law of Massachusetts. Her right to sue in this Commonwealth, in her representative capacity, is upon causes of action which accrued to her intestate, or which grow out of her rights of property, or those of his creditors. The remedy which the statute of New York gives to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him the right to sue in our Courts, and to transmit the right of action from one person to another in connection with the representation of the deceased. The only construction which the statute can receive is, that it confers certain new and peculiar powers upon the personal representative in New York. The administrator in Massachusetts is in privity with the New York administrator only to the extent which our laws recognize. A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one State to the tribunals of another." To the same effect is the decision in *Woodward v. Michigan Southern, &c. Railroad Co.*, (10 *Ohio State R.*, 121.)

The complaint is dismissed.

John T. Cornell, for the plaintiff.

Robert W. De Forest, for the defendants.

The United States v. Ronzone.

THE UNITED STATES v. PHILIP RONZONE.

A motion being made to quash an indictment for a misdemeanor, an information was filed setting forth the same charge as that in the indictment, accompanied with an affidavit as to the identity of the offence. A *nolle prosequi* was entered on the indictment, and the defendant moved to quash the information, on the ground that there had been no preliminary examination before a Commissioner nor any order to show cause: *Held*, that the motion must be denied.

(Before BENEDICT, J., Southern District of New York, December 9th, 1876.)

BENEDICT, J. The defendant was indicted for a misdemeanor. Objection being taken to the averments of the indictment, and a motion to quash being made, the District Attorney filed an information setting forth the same charge contained in the indictment, accompanied with an affidavit showing that the offence charged in the information had been made to appear to a grand jury, and that the grand jury, upon evidence, had found an indictment against the accused for the same offence charged in the information. Upon filing the information, a *nolle prosequi* was entered upon the indictment, and thereupon a motion was made, in behalf of the accused, to quash the information, upon the ground that he had not been afforded a preliminary examination before a Commissioner, nor an opportunity to show to the Court, upon an order to show cause, the absence of evidence to justify placing him upon trial.

The case of *United States v. Shepard*, (1 Abb. U. S. Rep., 431,) was cited in support of the motion. That case is no authority for holding that an order to show cause and a hearing thereon is a necessary preliminary to a proceeding upon information, for, in that case the Court says: "It would certainly be quite foreign to any known practice in the United States Courts, to pursue the English practice of requiring a rule for the accused to show cause before the Court and there contest the question whether the evidence justified placing him on

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trial." Nor is that case authority for holding that an examination before a Commissioner is, under all circumstances, a necessary preliminary to proceedings by information. In Shepard's case there had been no preliminary inquiry, either before a Commissioner or before a grand jury, and the information was not accompanied with any oath whatever. The question, whether the fact of an indictment having been found for an offence would not justify placing the accused on trial upon an information charging the same offence, was not before the Court in Shepard's case, and was not there decided. There have been many cases where the exhibition of an indictment found in one District has been deemed sufficient evidence to warrant an arrest in another: and there is one adjudged case where the precise question here raised was involved. I allude to *United States v. Waller*, (1 *Sawyer*, 701,) where an indictment had been found which was quashed, whereupon the District Attorney filed an information alleging the offence charged in the indictment, and the accused then moved that the information be quashed. The Court refused to quash the information. The decision in Waller's case is sufficient authority to support the present proceeding, and the motion to quash this information must be denied.

Benjamin B. Foster, (*Assistant District Attorney*), for the United States.

Louis F. Post and *Abram J. Dittenhoefer*, for the defendant.

The United States v. Schillinger.

THE UNITED STATES, PLAINTIFFS IN ERROR

vs.

JOHN J. SCHILLINGER, DEFENDANT IN ERROR.

Under § 6 of the Act of July 14th, 1870, (16 *U. S. Stat. at Large*, 257,) which imposes a tax on gains, profits and income for the year 1871, and no longer, the amount of a promissory note taken in 1871, on the sale, in that year, of a patent right, but not due until some time in 1872, and paid in that year, is not taxable as income for 1871.

(Before JOHNSON, J., Southern District of New York, December 21st, 1876.)

JOHNSON, J. The question on this writ of error is, whether the defendant was liable to an income tax for the year ending December 31st, 1871, upon the amount of certain promissory notes. These notes were received by him during the year 1871, upon a sale of certain patent rights, in part payment of the price thereof. They did not become due until some time in the year 1872, and then they were paid. In my opinion there is no ground for this action. The tax was imposed for the years 1870 and 1871, and no longer, upon the gains, profits and income of every person residing in the United States. (*Act of July 14th*, 1870, § 6, 16 *U. S. Stat. at Large*, 257.) In the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time. In this case, the defendant changed his patent rights for promissory notes payable in the future. Their value was uncertain; they might or might not be paid; but, until they were paid, they were not income, but only the ground of expecting income. The notes were no more taxable as income than would have been other patent rights, if the defendant had received them in payment of those he sold. There are in the next section of the statute, sec. 7, provisions which confirm this construction. It makes interest received

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or accrued upon all notes, bonds and mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, subject to the income tax. The purpose of this is evidently to prevent a man escaping the income tax, by abstaining from taking that which is due him. On the same principle, had these notes been due, and had the defendant allowed them to remain unpaid, there might have been room to contend that their amount should be regarded as income; but, not being due, when the income had become fixed for the year, they were no part of the defendant's income.

The judgment was in accordance with the law and must be affirmed.

Roger M. Sherman, (Assistant District Attorney,) for the plaintiffs in error.

David L. Williams, for the defendant in error.

AUGUST SELIGMAN

vs.

JOSEPH DAY AND NATHAN HYMAN. IN EQUITY.

The claim of letters patent granted to Phillipp Lippmann, September 30th, 1878, for "a corset clasp and cloth attachment," namely, "As a new article of manufacture, a covered corset clasp, the cloth of which forms a marginal flap or flaps along its length, suitable for, and adapted to, being sewn upon the corset, substantially as described, and for use in the place of broken, injured or worn out clasps or cloth, as herein set forth," claims merely the making and selling a part of an old and known manufacture as a new way of trade, and is not valid.

(Before JOHNSON, J., Southern District of New York, December 21st, 1876.)

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JOHNSON, J. This is a motion for an injunction to restrain, pending the suit, the infringement by the defendants of letters patent No. 143,359, granted to Phillipp Lippmann, dated September 30th, 1873, for "a corset clasp and cloth attachment." The patentee claims, "as a new article of manufacture, a covered corset clasp, the cloth of which forms a marginal flap or flaps along its length, suitable for, and adapted to, being sewn upon the corset, substantially as described, and for use in the place of broken, injured, or worn out clasps or cloth, as herein set forth."

The patent is not sustained by any previous adjudication and it is attacked by affidavits tending to show that the article which the patent describes was in earlier use than the time claimed by the patentee as that of his invention. Want of novelty may be made out, even conceding that, in a certain sense, the use which the patentee makes of the article is new. It is shown, that corset clasps covered with material similar to that of the corsets to which the clasps were to be applied, have been long made with flaps by which they might be sewn upon the rest of the corset; and that they were so sewn to the other parts of the corsets, in order to complete them. It is, also, shown that these, when worn out, have been frequently, and as matter of business, removed and replaced by new ones sewn on to the old corsets by means of the flaps. These, in a legal sense, are the uses to which the patentee contemplates that his articles shall be put; but he insists, inasmuch as he manufactures these clasps with covers, as a separate article of trade, in assorted sizes, and applicable by purchasers to the making or mending of corsets generally, that a quality of patentable novelty is imparted, not exactly to the article itself, but to the manufacture of the article. It is the thing made that is patentable or not. The use made of it is not patentable. The right to make the thing involves the right to use it, when made, at the pleasure of its owner. To make and sell a part of a known thing, as a separate article, is not patentable. If knife blades had never been made and sold separately from their handles, or the handles separately from

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the blades, it would not be patentable to introduce either of those manufactures. Upon the affidavits as they stand, it appears to me that the plaintiff's claim is merely to the making and selling a part of an old and known manufacture, as a new way of trade, and that this is not, in its nature, the subject of a patent. The motion for a preliminary injunction must, therefore, be denied.

John B. Staples, for the plaintiff.

John T. Richards, for the defendant.

THE UNITED STATES vs. JOSEPH BARNABO.

The laws of the State of New York do not deprive of the right of suffrage a person who has been convicted in a Court of the United States of the offence of uttering a counterfeited security of the United States, such offence being created by § 5431 of the Revised Statutes of the United States.

An indictment will not lie, in a United States Court in New York, against a person for having fraudulently registered at a registry of voters in New York, for an election for representatives in Congress, when he was disqualified as a voter by reason of having been convicted of a felony, where the conviction set forth is for having committed the offence created by § 5431 of the Revised Statutes of the United States, of uttering a counterfeited security of the United States.

(Before BENEDICT, J., Southern District of New York, December 29th, 1876.)

BENEDICT, J. The accused is charged with having fraudulently registered at a registry of voters for an election for representatives in Congress, he being at the time disqualified as a voter by reason of having been convicted of a felony. The conviction set forth is a conviction of uttering a counterfeited security of the United States, the offence being created by § 5431 of the Revised Statutes of the United States. A demurrer to the indictment presents the question whether the laws of the State of New York deprive of the right of suf-

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frage a person who has been convicted, in a Court of the United States, of an offence against the United States, of the character described in § 5431 of the United States Revised Statutes. The question is new in this Court, and I have not been referred to any case where the question has arisen in the Courts of the State. In order to a proper understanding of the statutory provisions in the laws of the State of New York, bearing upon the question, mention must be made of the following provisions in those laws. According to the provisions of § 25 of the Act of April 17th, 1822, no person was allowed to vote who had been "convicted of any infamous crime." In 1823, the second Constitution of the State took effect, and gave authority to pass laws "excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes." In 1828, the Revised Statutes of the State (1 *R. S.*, 127, § 3,) excluded from the right of suffrage every person "convicted *within this State* of an infamous crime," "unless he shall have been pardoned by the Executive, and, by the terms of such pardon, restored to all the rights of a citizen." In order to prevent infractions of this law, further provision was then made, (1 *R. S.*, 135, § 21,) that, "if any person so convicted shall vote at any such election, unless he shall have been pardoned and restored to all the rights of a citizen, he shall be deemed guilty of a misdemeanor," &c. An original note of the revisers to chapter 6, title 4, article 2, section 10, says: "The Act of 1822, § 25, provides, that no person who has been convicted of an infamous crime shall be permitted to vote, but it does not point out any mode in which a challenge for that cause shall be determined. Parol evidence of the fact of conviction ought not to be received; nor ought the oath of the person challenged to be demanded. The revisers have therefore, in the above section, required the production of the record; though it is worthy of consideration whether such a regulation would not make the exclusion, to all practical purposes, a nullity. Perhaps a list of the convicts might be annually furnished to the town clerks, and be made evidence in cases of this sort." On the 5th of

April, 1842, a substitute for chapter 6, of part 1, of the Revised Statutes, was enacted, in which it was provided, (*title 1, § 3,*) that "no person who shall have been convicted of an infamous crime *deemed by the laws of this State a felony*, at any time previous to an election, shall be permitted to vote thereat, unless he shall have been pardoned before or after his term of imprisonment has expired, and restored by pardon to all the rights of a citizen." This provision is still in force, and the question in hand depends upon the effect to be given to this statute of the State.

It will be noticed that the language of the original Act of 1822 is sufficiently broad to cover all convictions of any infamous crime, wherever had. The Revised Statutes added, in express terms, the limitation, that the conviction must have occurred "within this State," and, by implication, the further limitation, that it must be a conviction in the Courts of the State. This implication appears to arise out of the exception as to persons "pardoned by the Executive, and, by the terms of such pardon, restored to all the rights of a citizen." The Executive of the State only can be referred to here, as no pardon issued by the President of the United States would, by its terms, *restore* a person to the rights of a citizen of the State of New York. It would appear, therefore, proper to construe the statute as referring to those crimes only that can be pardoned by the Governor of the State. Furthermore, such appears to have been the understanding of the statute by the revisers themselves, as their note above referred to shows. For, the remedy proposed by them in the note, while sufficient, if only convictions in the Courts of the State are within the scope of the statute, is wholly insufficient if the statute includes convictions in the Courts of the United States. The limitation which thus appears in the Revised Statutes is more plainly seen in the enactment of 1842, for, while, in that Act, the exception as to persons pardoned is substantially the same as before, the disqualifying clause requires not only that the conviction shall be of an infamous crime, but that it shall be of a crime "*deemed by the laws of*

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this State a felony." This statute requires not only that the crime be of the class of infamous crimes, but, also, that it be such a crime as, by the laws of the State, is declared to be a felony. The Courts of the United States take cognizance only of statutory offences against the United States, created by the laws of the United States, and I doubt whether it can be said that any mere statutory offence, created by a law of the United States, is "deemed by the laws of the State a felony." It has been contended that the word "*deemed*," as it is used, shows an intention to include all crimes presenting the feature designated by the laws of the State as the characteristic of a felony, namely, a liability to be punished by death or by imprisonment in a State prison, (2 *R. S.*, 702, § 30,) and hence it is concluded, that, inasmuch as the accused, upon his conviction under § 5431, became liable to imprisonment in a State prison, he is within the scope of the disqualifying statute. Here this difficulty arises, that, while the laws of the State are framed with the intent that the mode of punishment liable to be inflicted shall determine the character of the offence, as a felony or otherwise, the laws of the United States are not so framed. By the laws of the United States, upon conviction for any offence, where the sentence imposed is an imprisonment for a period of more than one year, the sentence may be directed to be executed in a State prison, (§ 5541, *Rev. Stat. U. S.*) And there are offences against the United States made, by express terms, misdemeanors, although punishable by hard labor in a State prison. It would, therefore, result, that a conviction for any offence against the United States, where imprisonment for a period of more than one year can be inflicted, would have the effect to disqualify the person convicted.

The better solution of the question is to be found in other provisions of the statutes of the State, now to be mentioned. On the 14th of May, 1872, was passed an Act, entitled, "An Act in relation to elections in the city and county of New York, and to provide for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage therein." In § 33 is found adopted the suggestion originally made by the

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revisers, in their note above referred to. By this section, obviously for the purpose of providing means of proving such convictions as work the disqualification of a voter, it is required, that the clerks of the Courts of oyer and terminer and general and special sessions shall file with the chief of the bureau of elections a certified record of all convictions for offences punishable by death or imprisonment in a State prison. Here, the remedy provided by the law affords a statutory indication that the disqualifying provision is understood as applying only to cases of conviction in a Court of the State. Furthermore, § 76 of the Act of 1872—plainly inserted for a better enforcement of the disqualifying provision—declares, that, “if any person who shall have been convicted of bribery, felony, or other infamous crime, *under the laws of this State*, shall thereafter vote, * * * he shall, upon conviction thereof, be adjudged guilty of a felony,” &c. This section throws light upon the language of the disqualifying provision it was intended to enforce, and shows plainly that only convictions arising under the laws of the State are intended to work the disqualification of a voter. I, therefore, conclude, from an examination of the statutes of the State appertaining to this subject, that these statutes do not deprive of the right of suffrage a person who has been convicted, in the Courts of the United States, of a mere statutory offence against the United States.

This conclusion is strengthened by the construction put, by the Courts of the State, upon the provision respecting the disqualification of witnesses, contained in the laws of the State, where the language used is broader than that used in respect to voters. The provision in respect to witnesses is, that no person sentenced upon a conviction for felony, shall be competent to testify in any proceeding, &c., unless he be pardoned by the Governor, &c. (2 R. S., 701, § 23.) In *Cole v. Cole*, (50 How. P. R., 59, 66,) it is intimated, that a conviction in another State would not, probably, render the testimony of a witness inadmissible, by virtue of this statute; and this has been expressly ruled on several occasions at *nisi prius*, as I

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am informed. The cases are not reported. (See also *Com. v. Green*, 17 *Mass.*, 515; *Com. v. Hall*, 4 *Allen*, 305.)

It is proper to add, that the precise question in hand appears to have been presented to the Attorney-General of the State, and the opinion expressed by that officer is in harmony with the conclusion I have reached. See *Opinions of Attorneys-General of the State*, page 413, and again on page 524, where the Attorney-General says: "I am of the opinion that a conviction for crime, in order to disqualify an elector, must be had under the jurisdiction of, and in, the Courts of this State, and that a conviction under the Federal laws and in the Federal Courts does not work such disqualification."

In accordance with these views the demurrer is sustained, and the accused must be discharged.

Benjamin B. Foster, (*Assistant District Attorney*,) for the United States.

Ambrose H. Purdy, for the defendant.

WILLIAM J. CLARK*

vs.

THE KENNEDY MANUFACTURING COMPANY AND EDWIN HILLS.
IN EQUITY.

The invention set forth in reissued letters patent No. 6,291, granted to William J. Clark, February 16th, 1875, for an "improvement in the manufacture of bolts from round rods," consists in the manner in which the inventor applies lateral compression to the manufacture of an angular neck, and in the manner in which he permits the shaping mechanism to become anvil heads upon which the header can operate to form a head upon the bolt.

The patent is to be construed as claiming a method or process, which consists in the combination of the operation of swaging the blank laterally by the described dies, or their equivalent, operating in substantially the same way, with

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the operation of upsetting the end of the bolt upon the anvil ends of the dies, to form the head. It does not claim broadly swaging by suitable dies, combined with upsetting to form a head.

Therefore, a machine in which the swaging is produced by dies of a construction radically different from the dies of the patent, does not infringe the patent.

(Before SHIPMAN, J., Connecticut, January 1st, 1877.)

SHIPMAN, J. This is a bill in equity to restrain the defendants from an alleged infringement of reissued letters patent of the United States, No. 6,291, granted to the plaintiff, and dated February 16th, 1875, for an "improvement in the manufacture of bolts from round rods." The original patent was ante-dated February 2d, 1864, and the first reissue was dated March 28th, 1865. The answer alleges that the second reissue was not for the invention which was described in the original patent, and denies that the defendants have infringed the patent, and denies that the plaintiff was the first inventor of the patented improvement.

The main question in the case is in regard to infringement, and this question involves the precise character and extent of the plaintiff's invention, and the proper construction of the letters patent. It is necessary to ascertain, in the first place, from the testimony as to the state of the art, and from the original and reissued patents, what was the invention of the patentee. Prior to the date of the plaintiff's invention, angular necked, round stemmed and headed bolt blanks had been made from iron whose cross section was square. The round stem, which was to receive the screw thread, was made cylindrical by rolling or hammering, which required expensive machinery and much labor. Angular necked bolt blanks were also made from the round iron of commerce. These blanks were formed in dies, a portion of which was round and a portion was square, but the neck of the bolt was formed wholly by the operation of upsetting or driving the metal into the square fixed matrix of the dies. It was practically impossible by the upsetting process to form a neck whose length would exceed the diameter of the bolt. The average length of the

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necks of bolts made by "staving up" was somewhat less than the diameter of the bolt. The head was formed by the same upsetting operation. It is necessary that the neck should be of considerable length, in order to prevent the bolt from turning around after it is driven into the wood and the nut is screwed upon the shank. The necks of staved up bolts were too short, and the bolts revolved in the wood. It is also desirable that the corners of the neck should be full and angular, so that the bolt may remain firmly imbedded in its place. The plaintiff's invention resulted in making from round iron an angular necked, round stemmed and headed bolt blank, having a neck of sufficient length to meet these mechanical requirements. He succeeded in making a cheap bolt, which has gone into general use, and the validity of his patent has been substantially acknowledged by the manufacturers of the country. His mechanism is described in the original specification as follows: "I construct a pair of dies of cast iron or other metal, making the grooves therein, for a portion of their lengths, of a semi-cylindrical form, and the remaining portion of an angular form. Each die being provided with a groove of this character, will permit the two, when placed together, to present at one end a cylindrical opening corresponding in diameter to that of the cylindrical bolt blank, while the opening at the opposite end, instead of being cylindrical, will be square or angular, but of similar sectional area to the cylindrical end, so that, when the two dies are forced together upon the bolt blank, (which is heated to a proper degree before being placed therein,) that part of the blank lying within the angular portion of the grooves will be swaged out, and forced to take the angular form corresponding to that of the angular portion of the groove, while the part lying within the cylindrical portion of the groove will retain its original shape, and, while the bolt blank is held in the dies, they form an anvil upon which a portion of the blank projecting from the dies, at the end containing the angular grooves, is upset, and formed into a head, by any proper machinery."

It will be understood that the process of moulding or shap-

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ing hot iron by swaging had long been understood at the date of the original patent, and that the manufacture of bolt blanks by swaging or lateral compression was also then known. Round necked bolts from square iron had been made by swaging, and square headed bolts had been made by the same process, but square necked bolts had not been made from round iron by lateral compression, prior to the plaintiff's invention.

The plaintiff, in the first place, insists that his invention consisted in constructing the angular neck mainly by the operation of swaging, supplemented by the operation of staving up, so that the neck of his bolt had all the advantages of swaging, in point of length, and was completed by the necessary result of the action of the header in forming the head, by pressing and forcing the metal into the mould, and that the invention resides in the combination of these two separate operations, which co-operate with each other in forming the bolt. The defendants, while conceding the importance of the invention, insist that it consists in the peculiar character of the dies which are described in the patent.

The main object of the patentee was to construct an angular necked bolt blank from round iron. The blank was, of course, to be headed, for a head is a necessary part of a bolt, and it was to be headed by some kind of upsetting machinery theretofore in use; but his inventive skill was directed to the construction of an angular necked bolt which was to be headed by old mechanism of some sort. If the patentee had supposed that the assistance which the upsetting operation furnished to the swaging operation, in the formation of the neck, was a part of his invention, the second reissue would naturally have distinctly pointed out this feature. The important part of the specification is as follows: "According to my invention, I make an angular necked, round stemmed, headed bolt blank from a round piece of iron, by first forming the neck into an angular shape in cross section by lateral pressure at all sides simultaneously, and then, while the said piece is firmly held in proper position, forming its projecting end into a protuberant head of the desired contour, by upsetting against the dies, as

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an anvil, by suitable machinery, that acts to upset the metal against the anvil ends of the closed dies, and form the head by a motion in the line of the axis of the bolt blank. * * *

The operation of the dies is as follows: A round piece or rod of metal, suitably heated, is placed between the open swaging dies, with a sufficient portion protruding at the anvil ends thereof to form the head. A lateral pressure is then brought against the dies and they are forced together, giving to the metal substantially the angular shape of the matrix formed by the dies. While the metal remains thus held, the upsetting machinery drives the protuberant end of the rod or piece longitudinally against the anvil ends of the closed dies, thereby forming the bolt head by upsetting the metal against the anvil ends of the dies, which only shape its under surface." It is true, that the patentee says that the lateral pressure gives to the metal "substantially the angular shape of the matrix formed by the dies," but he does not say that the shape is perfected by the upsetting operation, or give any further suggestion that the upsetting machinery performs any other office than that of shaping the head. Neither was there any testimony to the effect that, after the metal had been swaged, the angular shape of the neck was made more perfect and complete by the upsetting operation. It is undoubtedly true, that the portion of the neck under the head is made more full by the upsetting process, but the angularity of the neck is not increased thereby; and in neither of the patents is this fullness claimed as an improvement, or that the formation of the neck by the aid of upsetting is a part of the invention. On the contrary, the patentee says, in his first reissue, that the fullness is not intentional, but is incident to the operation of making the head. Again, the first two claims of the patent, which are the process claims, are as follows; "1. The process, substantially as hereinbefore set forth, of forming from a round piece of metal a headed bolt blank having an angular neck and a round stem, which process consists in subjecting a portion of the length of the round piece of metal to lateral swaging or compression on all sides simultaneously, to form the

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angular neck, and, while the piece is firmly held with the neck portion inclosed at all sides, upsetting the projecting end of the swaged piece of metal, to form the head of the bolt blank. 2. The process, substantially as hereinafter set forth, of forming the angular neck and protuberant head of a bolt, which consists in subjecting a round piece of metal to lateral swaging between angular grooved dies, the end surfaces of which dies, when closed, form the anvil against which the projecting end of the swaged piece of metal is upset and formed into a head by proper machinery." From the language of each of these claims, it appears to be manifest, that the formation of the neck is claimed to be effected by the swaging dies, before the heading machinery commences the formation of the head; and all that is claimed for the heading machinery is the compression of the head against the anvil ends of the dies.

It is next contended, that the invention consisted in the making a new and useful bolt by a process composed of two operations—the first, that of lateral swaging by dies capable of swaging; and the second, that of upsetting, to form the head—and also consists of a process to produce the result by means of certain described mechanism. It is true, that the bolt is formed by both swaging the neck and upsetting the head, and that the patentee is entitled to claim the upsetting in combination with the swaging operation, because these operations in combination had not existed in the formation of an angular necked and headed bolt from round iron. The gist of the invention and the inventive skill, however, consisted in making an angular necked blank from round iron, and, irrespective of the claims of the patent, and regarding the state of the art in connection with what was actually done by the patentee, I am of opinion, that his invention, or the new and useful method by which he manufactured bolts, consisted in the manner in which he applied lateral compression to the manufacture of an angular neck, and in the manner in which he permitted the shaping mechanism to become anvil heads upon which the header could operate to form a head upon the bolt. The patentee did not discover that swaging

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round iron would form an angular neck, and that upsetting would form a head, and that both operations would form a bolt; but he did invent, what was previously unknown, the mechanical means by which swaging would form an angular neck from round iron, which mechanism could be used in connection with upsetting. This opinion is confirmed by the description which the patentee gives of his invention in the specification of his reissued patent, which has been quoted, and in which the mode of operation is clearly described.

Such being the character and extent of the invention, the next question is, as to the construction which shall be given to the reissued patent. The first two claims, upon which the controversy mainly turns, have been quoted. The defendants contend that these claims can only be sustained by a construction which shall limit the process to the use of the specified dies, and that, if the claims are broadly for a process, irrespective of the peculiar mechanism, the reissued patent is for an invention which was not indicated in any part of the original patent or in the drawings attached thereto. The claim in the original patent is as follows: "The combination and use of metallic dies for the purpose of giving angular shape to a portion of a cylindrical bolt, by compression laterally, leaving the remaining portion of the bolt in its original form, and which dies, at the same time, serve the purpose of an anvil, upon which the head of a bolt is formed, by upsetting a projecting portion thereof, substantially as set forth;" and the plaintiff insists, that, inasmuch as the patentee's process involved both the swaging and upsetting operations and possessed the advantages of each, the reissue was properly allowed. I am of opinion that the reissue was properly granted, and that the patentee had a right either to claim his invention as a process, within certain limitations, or as a part of a machine. But the patentee cannot, by obtaining a reissue for a process, enlarge his right to a monopoly beyond the actual invention; and, when it is insisted that he invented a new process of using his improved dies or any other dies, "which process consisted in the combination of the operation of swaging the

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blank laterally, with the operation of upsetting the end of the bolt to form the head," such a proposition is broader than the invention will justify. All that can properly be claimed in behalf of the patentee is, that he has invented a new way of manufacturing bolt blanks by the described swaging dies, to be used in connection with upsetting machinery; and his invention may properly be claimed as a method or process, which process consisted in the combination of the operation of swaging the blank laterally by the described dies, or their equivalent, operating in substantially the same way, with the operation of upsetting the end of the bolt upon the anvil ends of the dies, to form the head. The thing invented and patented was not any mode of swaging combined with upsetting, but it was "the employment or specified means, or their equivalents, for the accomplishment of a desired end." (*Roberts v. Dickey*, 4 *Fisher's Patent Cases*, 532.) By limiting the first and second claims of the reissued patent to the use substantially of the dies described in the specification, or their equivalents, the patent will not be broader than the invention, and no question can be made that it is not for the same matter which is contained in the original patent. But the plaintiff is not limited to the exact form of the dies which is mentioned in the third claim. That form is not particularly relied upon in the specification and is not a material part of the mechanism.

The remaining question is in regard to infringement. The round portion and the square portion of the plaintiff's dies are of similar area, and, by means of this similarity, the swaging operation is performed. The form of the defendants' dies is substantially like that of the dies which were previously used to form bolts by the upsetting operation alone. One of the defendant's dies is solid, the upper part being V shaped and the lower part cylindrical. The other die is in two separate parts, each portion being the same as the corresponding portion of the solid die. The area of the squaring dies is larger than the area of the round dies, so that there can be no lateral compression by the angular dies until after the intervention

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of some operation other than the grasping of the iron by the dies. If the ordinary round rod of commerce is placed within the dies, and the two parts of the divided die are placed upon a line with each other, and the dies are brought together, there will be no swaging. Swaging in this machine takes place only after the header has begun to operate. Although the fact that swaging does take place was denied by the defendants, the sharp and well-defined corners of the neck portion of the blank, and the result of the operation, proves that the bolts have been swaged. The swaging must have been effected in one of two ways. Sometimes the separate square part of the necking die is not set in a line with the round or gripping portion, and the gripping dies come in position and are locked before the squaring dies are locked. Meanwhile, the header has partially filled the matrix with hot iron, and, while the header is within a very short distance from the ends of the dies, the angular dies come completely together upon the iron which has been pressed into the matrix and complete the square by lateral compression. Again, when the separate portions of the die are on a line, the separate angular die is held in its place much less firmly than the round die. The round die is held in place by the whole strength of the frame of the machine, while the angular die is so weakly held that it yields or "gives" a little as the iron is being upset by the header. Then, and before the header has completed its movement by about one-eighth of an inch, a second cam comes into action behind the angular die, for the purpose of locking it, and forces the die laterally, whereby the swaging operation is performed.

Is the swaging operation in the two machines effected in substantially the same way? In one, the iron is swaged in dies which are constructed to swage, in which the different parts of the dies are of similar sectional area. In the other, the angular neck is substantially made by upsetting the iron into a matrix, and is completed by swaging. In the plaintiff's machine, the necks are swaged, and the head is formed by upsetting. In the defendants', the necks are formed by upset-

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ting and by swaging. But the material difference is, that the swaging is produced by dies of a construction radically different from the plaintiff's dies, and, unless swaging by suitable dies, combined with upsetting to form a head, is secured by the plaintiff's patent, it will not be contended that the defendants' machine is an infringement.

The vital point in the case is in regard to the extent of the plaintiff's invention, and the construction to be, therefore, given to his patent. In order to constitute infringement, a broad construction must be placed upon the patent, so as to include any machine for making bolts from round iron, in which machine the two operations of forming the angular neck by dies which will swage, and forming the head by upsetting, are combined. Such a construction, I have already said, is, in my opinion, broader than the actual invention.

"The general terms, and, sometimes, special words, in the claims, must receive such a construction as may enlarge or contract the scope of the claim, so as to uphold that invention, and only that invention, which the patentee has actually made and described, where such construction is not absolutely inconsistent with the language of the claim." (*Estabrook v. Dunbar*, 10 *Off. Gaz. of Patent Office*, 909.)

The bill is dismissed, with costs.

Charles E. Mitchell and *Benjamin F. Thurston*, for the plaintiff.

Charles R. Ingersoll, for the defendants.

Kelsey v. The Pennsylvania Railroad Company.

JOHN KELSEY

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

A corporation which has appeared and answered generally in an action cannot afterward insist that this Court never acquired jurisdiction over it because process was not served upon it in the District of which it was an inhabitant at the time of service.

An omission to allege sufficiently, in a complaint, that the defendant is a citizen of a different State from that of the plaintiff, is amendable.

(Before WALLACE, J., Southern District of New York, January 4th, 1877.)

WALLACE, J. The defendant having appeared and answered generally in the action, cannot now insist that this Court never acquired jurisdiction because process was not served upon it in the District whereof it was an inhabitant at the time of service. Jurisdiction of the person of a defendant may be conferred by consent or waiver. Jurisdiction of the subject-matter of the action cannot.

The case of *Pomeroy v. N. Y. & N. H. R. R. Co.*, (4 *Blatchf. C. C. R.*, 120,) is not in point here. In that case the objection was taken by plea. Under the present system of pleading—that existing in the State Courts—I think it would be too late, after a general appearance in the action, for the defendant to avail itself of the objection by raising it by answer. However that may be, it is clearly too late after an answer upon the merits.

The defect in the complaint, of omitting to allege sufficiently that the defendant is a citizen of a different State from that of the plaintiff is amendable, and does not constitute a sufficient ground for dismissing the action, upon a motion of this kind.

The motion is, accordingly, denied.

Benjamin F. Russell, for the plaintiff.

Edmund R. Robinson, for the defendant.

The United States v. Jones.

THE UNITED STATES vs. GEORGE JONES.

On an application to a State Court for the naturalization of a foreigner, J. testified, as a witness, that he was well acquainted with the applicant. It appeared that he was a total stranger to the applicant, and volunteered as a witness: *Held*, that this was sufficient evidence to warrant a conviction of J., on an indictment for perjury, under § 5392 of the Revised Statutes.

(Before BENEDIOT, J., Southern District of New York, January 10th, 1877.)

THIS was an indictment, under § 5392 of the Revised Statutes, for perjury, in swearing, as a witness, upon an application made to a State Court for the naturalization of a foreigner. After conviction, the defendant moved for a new trial, on the ground that there was not sufficient evidence to support the verdict. The evidence showed that the defendant, at the time of an application to the State Court for the naturalization of a foreigner, testified before the Court, in behalf of the applicant, that he was well acquainted with the applicant, and that the applicant had lived in the United States for five years, and, during that period, had behaved as a man of good moral character. The prosecution showed, by the testimony of the applicant himself, that he had no acquaintance with the defendant, and that the defendant was a total stranger to him. It also appeared, that, at the time the applicant appeared before the Court, the defendant was loitering about the door of the Court room, having no apparent business there, and that, without any previous request or suggestion from the applicant, he accosted the applicant, and volunteered to be the witness upon his application to the Court.

Benjamin B. Foster, (Assistant District Attorney,) for the United States.

Abram J. Dittenhoefer, for the defendant.

BENEDIOT, J. The testimony given by the defendant, that he was well acquainted with the applicant, implied a mutual acquaintance, and was contradicted by the evidence of the ap-

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plicant, that he had never known the defendant. This evidence, coupled with the evidence as to the circumstances under which the oath was made, and the absence of any evidence tending to show previous acquaintance, was sufficient to warrant the verdict.

THE UNITED STATES vs. WILLIAM BURLEY.

B. registered as a voter, on the production of a certificate of his naturalization, which had been issued by a State Court without his presence in Court, and without any oath having been taken by him. The certificate was regular on its face. On an indictment against B., under § 5426 of the Revised Statutes, for using, for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued: *Held*, that the mere fact that B. knew that the certificate had been issued without his presence in Court, and without any oath being taken by him, was not sufficient to warrant a conviction.

(Before BENEDICT, J., Southern District of New York, January 12th, 1877.)

THIS was an indictment, under § 5426 of the Revised Statutes, for using, for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued. The evidence showed that the defendant had registered as a voter, upon the production of a certificate of his naturalization, which certificate had been issued by a State Court without the presence of the applicant in Court, and without any oath having been taken by him. The certificate was, in all respects, regular upon its face.

THE COURT held, that the mere fact that the defendant knew that the certificate had been issued without his presence in Court, and without any oath being taken by him, was not sufficient to warrant a conviction.

Benjamin B. Foster, (*Assistant District Attorney*), for the United States.

John L. Hill, for the defendant.

The United States v. Anthony.

THE UNITED STATES vs. JAMES ANTHONY.

An indictment, under § 3296 of the Revised Statutes, which charges a removal of a certain quantity of "distilled spirits" on which the tax had not been paid, to a place other than the distillery warehouse, is good.

(Before BENEDICT, J., Southern District of New York, January 15th, 1877.)

THIS was an indictment, under § 3296 of the Revised Statutes, and charged a removal of a certain quantity of "distilled spirits," on which the tax had not been paid, to a place other than the distillery warehouse. The defendant demurred to the indictment, on the ground that it did not charge any offence.

Roger M. Sherman, (*Assistant District Attorney*), for the United States.

Thomas Harland, for the defendant.

BENEDICT, J. While, in a strictly chemical sense, the terms "ethyl alcohol" and "spirits of wine" are generic terms, and the term "distilled spirits," as defined by § 3248, when used in that sense, would be generic, and not necessarily confined to the product of distillation, still, the term "distilled spirits" has also an ordinary and literal meaning, which implies distillation, and, when it is used in the latter sense, it is confined to the product of distillation. It is so used in § 3296 and in this indictment. Consequently, the indictment shows the subject-matter to be subject to tax, under § 3254, and is good.

The United States v. Miller.

THE UNITED STATES vs. CHARLES N. MILLER.

Spirits consigned to M. arrived, and he was notified, by the carrier, of their arrival. He surrendered his bill of lading, paid the freight, sold the spirits to a third party, and gave such party an order to receive the spirits, on which such party, the next day, received the spirits, and removed the same to his own premises. M. was indicted, under § 3318 of the Revised Statutes, for omitting to enter the spirits in his book, at the time of sending them out of his stock and possession: *Held*, that such removal of the spirits was a removal from the stock and possession of the defendant, within the meaning of § 3318.

(Before BENEDICT, J., Southern District of New York, January 17th, 1877.)

THIS was an indictment, under § 3318 of the Revised Statutes, against a wholesale liquor dealer, for omitting to enter certain spirits in his book, at the time of sending them out of his stock and possession. Certain spirits consigned to the defendant, from the West, arrived in New York on March 15th, and notice of their arrival was given to the defendant by the carrier. Thereupon the defendant surrendered his bill of lading, paid the freight, and sold the spirits to a third party, sending the purchaser an order for their delivery to him. On the next day the purchaser presented the order, and received the spirits into his possession, and removed the same to his own premises.

Roger M. Sherman, (Assistant District Attorney,) for the United States.

Treadwell Cleveland, for the defendant.

THE COURT held that the removal of the spirits, under the circumstances stated, was a removal from the stock and possession of the defendant, within the meaning of § 3318.

The United States Rifle and Cartridge Co. v. The Whitney Arms Co.

THE UNITED STATES RIFLE AND CARTRIDGE COMPANY AND
E. REMINGTON & SONS

v8.

THE WHITNEY ARMS COMPANY AND OTHERS. IN EQUITY.

C. applied for a patent in January, 1859. The application was rejected in February, 1859. No appeal was taken. In February, 1860, the application was withdrawn, and the balance of the fee was refunded. In May, 1868, C. filed a new application, which was rejected on the ground of abandonment. This decision was affirmed by the Commissioner of Patents, and his decision was reversed by the Supreme Court of the District of Columbia. The Commissioner then declined to issue the patent. After the passage of the Patent Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 198,) a new application was filed, and the patent was issued, it being for "improvements in breech loading guns." During the 8 years from 1860 to 1868, C. obtained 22 patents on his own application, 9 of them relating to breech-loading fire-arms, and though, during a part of the time, he was poor, and in debt, and in ill health, he prosecuted his other inventions with energy. During the same interval patents were granted to others embodying his inventions: *Held*, that, under § 35 of said Act of 1870, which provides that, upon the hearing of the renewal, provided for by that section, of an application before rejected or withdrawn, "abandonment shall be considered as a question of fact," the decision of the Commissioner on the question of abandonment is not final, but may be reviewed in a suit brought on the patent;

That no laches could be imputed to C. after May, 1868;

That his invention was abandoned before May, 1868.

The use of an invention for mere competitive examination, experiment and test, is not a public use.

(Before SHIPMAN, J., Connecticut, January 22d, 1877.)

SHIPMAN, J. This is a bill in equity, to restrain the defendants from an alleged infringement of letters patent granted to John W. Cochran, on May 7th, 1872, for "improvements in breech-loading guns." The plaintiffs are the owners of the patent, and E. Remington & Sons, for whose benefit the suit is brought, are the exclusive licensees thereunder. The answer of the defendants denies infringement

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upon their part, and also denies novelty of invention upon the part of the patentee, and alleges that the application of the said Cochran for a patent was filed on May 6th, 1868, and that, for more than two years prior to said date, the invention had been in public use and sale, with the consent and allowance of said Cochran, and that, prior to the said date, the invention had been abandoned to the public.

Mr. Cochran's application for a patent was made on the 11th of January, 1859, and was rejected February 8th, 1859. No appeal was taken from the original rejection by the primary examiner, and, on February 20th, 1860, the application was withdrawn, and twenty dollars, the balance of the Patent Office fee, was refunded to the applicant. On May 6th, 1868, Mr. Cochran filed a new application, which was rejected upon the ground of abandonment. The decision of the board of examiners was affirmed by Mr. Fisher, who was then Commissioner, whose decision was reversed by the Supreme Court for the District of Columbia. The Commissioner then declined to issue the patent, but, after the passage of the Patent Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 198,) a new application was filed, and the patent was issued by the successor of Mr. Fisher. During the interval of eight years between the first rejection and the second application, Cochran obtained twenty-two different patents upon his own application, nine of which patents relate especially to breech-loading fire-arms. He was constantly occupied after 1859, and especially during the war of the rebellion, in endeavors to perfect and to bring to the favorable notice of the War Department and of the public, his inventions other than the one which is now in controversy. He sold, in the year 1865, an English patent for another breech-loading fire-arm, for the sum of \$18,000, (of which sum \$5,000 was spent in making models and procuring foreign patents,) and went to England, on two occasions, for the purpose of introducing that weapon to the foreign market. He was, during a portion of this interval, very poor, in debt, and in ill health, and his habits were irregular, but he was prosecuting his other inventions with con-

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stancy and energy. There is no evidence that any arm embodying the invention in controversy was ever constructed by Mr. Cochran, or by any person on his behalf. Neither is there any evidence that he ever sought means to renew his application, or that he said or did anything which indicated his idea that this invention was to be pressed, or was to be or become available to him. On the contrary, he apparently acquiesced in the action of the Patent Office, and entirely turned his attention to other inventions. He died on January 2d, 1873. Patents were granted to James Stillman in 1865, and also to Laidley & Emory in 1866, for improvements in fire-arms, which are embodied in the gun of the defendants, and constitute its peculiar features. It was said by Commissioner Fisher, in his opinion upon the second application, that the primary examiner reported that the devices mentioned in the first and second claims of Cochran's specification were found in eighteen patents which had been granted between 1860 and 1868. I have no means of verifying the truth of this statement.

As I think that the principal question in the case is in regard to the validity of the Cochran patent by reason of abandonment, or by reason of laches and want of diligence in procuring the patent, to the injury of the intervening equities of other inventors and patentees, I do not enter into the question of novelty, but assume that Cochran's invention was not anticipated by the persons named in the answer; and also assume, what was not seriously denied, that the Whitney gun contains, in substance, the Cochran invention.

The second application, which was rejected in 1869, was renewed after the passage of the Patent Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 198.) The 35th section of this Act provided, that, "when an application for a patent has been rejected or withdrawn prior to the passage of this Act, the applicant shall have six months from the date of such passage to renew his application, or to file a new one; and, if he omit to do either, his application shall be held to have been abandoned. Upon the hearing of such renewed applica-

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tions, abandonment shall be considered as a question of fact." Prior to the passage of this Act, the practice of the Patent Office in regard to the granting of renewed applications for patents, after the lapse of years from the date of their previous rejection or withdrawal, was not uniform. It had been held that the withdrawal of an application, and the neglect to prosecute it within a reasonable time, was an abandonment of the invention. The contrary had been held both by the Patent Office and the Courts. Inventors, whose applications had been rejected, were desirous of renewing them, and it was proper both that some limitation should be placed upon the time within which the new applications should be made, and that some stable principle should be adopted in regard to the question of abandonment. The section provided that this question should be regarded as a matter of fact, that lapse of time should not of itself be conclusive evidence of abandonment, but that the decision of each case should depend upon its peculiar circumstances, as a question of fact, and not of law.

Both parties, while uniting in this construction of the 35th section, differ materially in the effect to be given to the decision of the Commissioner upon a renewed application, which was made subsequent to the passage of the Act. The plaintiffs contend that this decision is conclusive upon the question of abandonment, and is not open to review collaterally, while the defendants insist that a patent granted upon a renewed application is still open to the same attacks which can be made upon any other patent.

The decision of the Commissioner in regard to the questions which have been committed to his exclusive jurisdiction are final. His decision is conclusive in regard to the sufficiency and competency of the formal acts and proofs which the statute provides shall be a prerequisite to the issuing of a patent. He is, moreover, made the tribunal which is to decide both in regard to the existence of those facts upon which a reissue is to be granted, and upon which an extension of patents issued prior to March 2d, 1861, is to be made. By the 32d section

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of the Act of 1870, he is to judge of the sufficiency of the reasons for delay, exceeding two years, in prosecuting applications which shall be thereafter made. Upon these three subjects which are submitted to him, his decision is conclusive. The statute also provides, (§ 24,) that an inventor of an improvement not known or used by others in this country, and not patented, or described in any printed publication, in this or any foreign country, before his invention, and not in public use or on sale, for more than two years prior to the application, unless the same is proved to have been abandoned, may obtain a patent therefor; and (§ 61,) that, in an action for an infringement, or a suit in equity for relief against infringement, the defence of abandonment may be pleaded. The granting of a patent is *prima facie*, but not conclusive, evidence that the right to the invention had not been surrendered to the public. I am of opinion that the decision of the Commissioner in regard to abandonment, upon renewed applications which were made under the 35th section, has no higher authority or more enlarged scope than his decision upon the same question upon an original application, and that all the defences which the statute authorizes, may be made as well in respect to patents granted upon applications renewed after the Act of 1870, as in respect to those issued upon original applications. The question is, simply, whether the 35th section gave the Commissioner the exclusive jurisdiction which is conferred upon him in the cases which have been mentioned. His decision upon a renewed application, prior to the Act of 1870, had no conclusive effect. The provision, that "abandonment shall be considered as a question of fact," when it is admitted that the object of the provision was primarily to make a distinction between questions of law and of fact, hardly confers upon the Commissioner an exclusiveness of jurisdiction which he did not previously have, and which he has not since had upon any other class of applications.

The question of abandonment being, then, one of fact and now open to examination, it is plain that no laches can be imputed to Cochran after May 6th, 1868, and that the considera-

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tion of the question is confined to the eight years subsequent to his withdrawal of the first application. It is also true, that lapse of time, *per se*, constitutes no abandonment, and that upon the defendants rests the burden of clearly establishing, by affirmative evidence, a positive and actual abandonment, or such laches as clearly to indicate an intent to abandon. It may be also considered as true, that the original application is conclusive evidence that, at its date, the inventor did not intend to give his invention to the public, but it is not conclusive evidence that he did not subsequently conceive such intention, or that he was not subsequently guilty of such neglect in obtaining a patent, that he ought not to have a monopoly to interfere with the equities of those who did anticipate him in giving the public the benefit of their inventive skill and labor.

In considering this question of fact, the Court is deprived of aid from the testimony of the inventor, who died in 1873. There is, also, an absence of the usual evidence from the declarations or the acts of the inventor in regard to his invention; and the Court has, therefore, to consider only the evidence which the undisputed facts on the one side or the other disclose, and the inferences from those facts. The application was withdrawn in 1860, and was not renewed until eight years had elapsed. In the meantime, Mr. Cochran's attention was directed to other kindred inventions, and to inventions of cartridges, shot and shell, for which he solicited and obtained twenty-two patents in this country. From his letters, which tell, also, a sad story of poverty, it appears that his mind was constantly engaged in these various patents, and his energies were constantly directed to their development. If it could be shown that his poverty was a reason for his not renewing and pressing an application for this particular invention, such testimony would tend greatly to dispel the idea of laches; but poverty did not deter him from entering into the necessary expenses which his other patents required, and from devoting himself energetically to obtain a recognition of their merits from the Government and from the public. His want

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of means was not, apparently, the cause of his not seeking to place the invention in its present position. He was absorbed in the attainment of success in the enterprises which occupied his mind, to the exclusion of this invention, which he did not regard as of much value as the others. In the meantime, during the war of the rebellion, inventive skill was greatly stimulated in regard to the perfection of breech-loading fire-arms, and the attention of other inventors than Cochran became engaged in the same line of thought and experiment which he had originally entered upon. In brief, the case shows that Cochran made an invention, and an application to the Patent Office, which, upon its rejection, he voluntarily withdrew, and for eight years neglected to renew, while he devoted himself to other inventions. He could have obtained a patent for this improvement, or he could, at least, have kept his application in the Office. Meanwhile, his invention is patented by others, and is finally introduced to the public in the year 1867, by the present licensees, when Mr. Cochran presents it again to the Patent Office. The new petition did not, of itself, sever the second application from the first. (*Smith v. Dental Vulcanite Co.*, 3 *Otto*, 486.) But the acts and conduct of Mr. Cochran show that the proceedings to obtain a patent, which were originally undertaken in 1859, had been abandoned, and that there was no apparent intent, at the time of the withdrawal, to file a new petition, but there was an acquiescence in the decision of the Patent Office. There was no continuity in the two applications.

The case presents very different circumstances from those which are disclosed in *Smith v. Dental Vulcanite Co.*, in which case the original application was never withdrawn, but, from the date of the third rejection, in February, 1856, until March, 1864, when the successful petition was again presented, it is found that the inventor did not remit his efforts, but did everything in his power to obtain a patent, and no act amounted to an acquiescence in the rejection. In this case there was a withdrawal of the first application, the efforts to obtain a patent were remitted, nothing was done towards that end,

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there was an apparent acquiescence in the rejection, there was a devotion of the thoughts and energies of the inventor to other pursuits, a cessation of active interest in the invention, and a relinquishment of any attempt to perfect his title thereto.

A person "may forfeit his rights as an inventor by a wilful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others." (*Kendall v. Winsor*, 21 *Howard*, 322.) If there was no purpose on the part of Cochran to withhold his improvement from the public, there was a negligent postponement of his claims until after other inventors had acquired equities, which it seems unjust to destroy. The language of Judge Woodruff in *Consolidated Fruit Jar Co. v. Wright*, (12 *Blatchf. C. C. R.*, 149,) though not necessary to the decision of that case, is just and is pertinent to the facts which are here disclosed: "If an inventor, without substantial reason or excuse, abandons the use of his invention, and for nine years sleeps on his rights, and in the meantime, others, in good faith, employ their industry, skill and money in producing the same thing, and give the public the benefit thereof, putting it into extensive use and on sale, such a state of facts not only warrants the inference of abandonment by the first inventor, but it also creates, as between him and the others, the same equity as would arise if such others had gone further and taken out a patent. Whether the device be patented, or has 'gone into use without a patent,' should make no difference. (*Kendall v. Winsor*, 21 *How.*, 322.) This is not because lapse of time, *per se*, deprives an inventor of his right, but because the circumstances giving character to the delay indicate abandonment; and, also, because the intervening rights of others make it inequitable that he should thereafter be permitted to assert any such exclusive title to the invention." To the same effect is the case of *Marsh v. Sayles*, (5 *Fisher's Patent Cases*, 610.)

I find no adequate evidence of public use by any one for two years preceding the date of the final application. Even if

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one of the guns, which was presented for competitive examination by the Board of Army Officers at Springfield, in the year 1865, embodied the Cochran invention, it does not appear to me that the submitting of an invention to the test of examination by experts, in competition with other inventions, is the public use to which the statute refers. A use for the mere purpose of competitive examination, experiment and test, is not a public use.

Let a decree be entered dismissing the bill.

Frederic H. Betts and George Gifford, for the plaintiffs.

Benjamin F. Thurston, for the defendants.

JAMES H. BEARDSLEY

vs.

JOHN M. LITTELL AND RUSSELL W. CHACE.

In an action at law in a Federal Court in New York, a defendant cannot, before the trial, be examined as a witness for the plaintiff out of Court, although such examination is provided for by the statute of New York, in suits in the Courts of New York.

The whole subject of oral testimony in actions at common law in the Courts of the United States is regulated by the statutes of the United States. Under the provisions of those statutes, the examination of an adverse party, as a witness, before trial, in a common law suit, cannot be had; and there is nothing in section 914 of the Revised Statutes of the United States, which provides for the conformity of the practice of the Federal Courts, in common law suits, to that of the State Courts, that supersedes those provisions.

(Before BLATCHFORD, J., Southern District of New York, January 25th, 1877.)

BLATCHFORD, J. This is an action at law to recover damages for the infringement of letters patent. It is at issue and ready for trial. The plaintiff now presents to the Court his

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affidavit, setting forth that the testimony of the defendant Littell is material and necessary for the plaintiff upon the questions of the kind and description of the machine used by the defendants, and claimed to be an infringement of the plaintiff's patent, "the amount which he has used the same," and the profits resulting from such use; that these matters are peculiarly within the knowledge of said defendant, and cannot well be proved except by his testimony; and that it is necessary to take his examination before the trial, in order that the plaintiff may properly prepare for the trial. On this affidavit an application is made for an order that the defendant appear for examination as a witness before the trial.

Section 389 of chapter 6 of the Code of Procedure of the State of New York, provides as follows: "No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter." Section 390 provides as follows: "A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission." Section 391 provides as follows: "The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the Court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance." It is provided by section 914 of the Revised Statutes of the United States, that "the practice, pleadings and forms and modes of proceeding in civil actions, other than equity and Admiralty causes, in the Circuit and District

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Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

The application now made is founded on the view that the practice of examining an adverse party before the trial, as a witness, in a suit at law, has become the practice of this Court by virtue of the above section 914. This is not a correct view.

Section 861 of the Revised Statutes provides that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open Court, except as hereinafter provided." There is nothing in the Constitution or statutes of the United States which sanctions any other mode of trial, in a common law action, than a trial by a jury, in the presence of the Court, unless such a trial is waived. Therefore, when the statute speaks of the examination of witnesses in open Court, in the trial of an action at common law, it means the examination of witnesses in the presence of the Court and the jury, at the trial, and not before the trial. But, as some witnesses might be out of the jurisdiction of the Court, or would probably be absent from such jurisdiction at the time of trial, provision was to be made for such cases. Hence the words, in section 861, "except as hereinafter provided." In pursuance of this view, section 863 makes provision for taking by deposition, *de bene esse*, before trial, by certain specified officers, out of Court, the testimony of witnesses who, though within the United States, are beyond the reach of a *subpœna*, or who are bound on a voyage to sea, or who are about to go, before the trial, out of the United States, or who are about to go, before the trial, to some place within the United States which is beyond the reach of a *subpœna*, or who are ancient and infirm. Section 866 makes provision for taking depositions under a *dedimus potestatem*, "according to common usage," that is, by commission, and for taking depositions *in perpetuam rei memoriam*. Sections 882 and following sections provide for documentary

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evidence. These are all the statutory provisions enacted by the United States on the subject; and it is quite clear that they cover the whole subject of oral testimony, in actions at common law, in the Courts of the United States. There is nothing in section 914 which supersedes them; and, under them, the examination of an adverse party as a witness, before trial, in a common law suit, cannot be had.

It may well be doubted whether there is anything in section 914 which applies to the subject of the evidence of witnesses, either as to its character or competency, or the mode of taking it. The expression "practice, pleadings, and forms and modes of proceeding," is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of the evidence of witnesses, which are regulated by specific provisions of law found in the same title of the same statute.

In the case of *The Indianapolis & St. Louis R. R. Co. v. Horst*, (3 Otto, 291,) the Supreme Court of the United States, in commenting on section 914, say that the language of that section, that the conformity mentioned in it is to be "as near as may be," means, "not as near as may be *possible*, or as near as may be *practicable*;" that the indefiniteness of the expression devolves upon the Federal Court the duty of construing and applying the provision in each case, and gives to the Court the power to reject any subordinate provision in a State statute, which, in its judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in the Federal Court; and that, while section 914 is, to a large extent, mandatory, it is also, to some extent, only directory and advisory. In the spirit of that language, it may be observed, that section 389 of the Code of Procedure of New York abolishes an action to obtain discovery under oath, in aid of the prosecution or defence of another action, and then section 391 allows an examination of an adverse party as a witness before trial, evidently as a substitute for a discovery before trial, in an ancillary action. But, a suit in equity, to obtain a discovery under oath, in aid of the prosecution or defence

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of a suit at law, is not abolished in the Courts of the United States. The distinction between suits in equity and actions at common law exists in the Courts of the United States. Such distinction is recognized by the Constitution, and cannot be abolished by Congress. It is also recognized in section 914. Therefore, one of the reasons for the practice, in the Courts of the State of New York, of examining an adverse party as a witness before trial, in a suit at law, does not exist in respect to the Federal Courts.

It is also worthy of consideration, that section 391 of the Code of Procedure of New York provides that the party to be examined shall be examined before a judge of the Court or a county judge, and shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. The examination, if allowed in the Federal Court, must take place before a judge of the Court. There is no alternative officer, to take the place of the county judge. If the party cannot be compelled to go out of the county where he resides, the benefit of the provision would practically be confined to suits pending in the counties where the Federal judges should happen to reside or to be present, unless the party to be examined could incidentally be found in such county. There would be no uniformity in such a provision, and such a practice could hardly be said, as a general practice, to conform "as near as may be" to the State practice.

Moreover, in view of the limited judicial force in the Courts of this District in comparison with the amount of the business pending in those Courts, and of the fact that the examination, if had, must take place before a judge of the Court, it is quite clear that an allowance of the practice would "unwisely encumber the administration of the law," especially in view of the fact that a party may, at the trial, be called as a witness by the adverse party, in a suit at law, and may, if a case exists under section 863, be examined as a witness, before trial, on behalf of the adverse party, by deposition *de bene esse*.

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The application is refused; and I am authorized to say that the Circuit Judge concurs in the foregoing views.

Walter S. Logan, for the application.

MARY L. GRIDLEY

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

This question was put to the applicant for a policy of insurance in a life insurance company: "Have the person's parents, uncles, aunts, brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?" He answered, "No, except one brother temporarily insane six years since; causes, domestic and financial trouble, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family, on either side of house, to my knowledge." The policy having been afterwards issued, in a suit brought on it the defendant proved the temporary insanity of an uncle of the applicant, but there was no evidence of any hereditary insanity in the family of the applicant: *Held*, that the question put to the applicant was only an inquiry whether any of the diseases mentioned in it had appeared among the relatives of the applicant in the form of an hereditary disease; that the applicant understood it in that sense; and that the answer was true.

(Before BENEDICT, J., Eastern District of New York, January 27th, 1877.)

BENEDICT, J. This is a motion for a new trial. The action is brought upon a policy of insurance, issued by the defendant upon the life of Fayette R. Gridley. The question of law presented is as to the proper construction to be put upon a question contained in the application for the policy, and on the answer given thereto by the applicant. The question is as follows: "Have the person's parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity,

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epilepsy, disease of the heart, or any other hereditary disease?" The answer given is as follows: "No, except one brother temporarily insane six years since; causes domestic and financial trouble, followed by hard drinking, and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family, on either side of house, to my knowledge."

Upon the trial the defendant proved the temporary insanity of an uncle of the applicant. There was no evidence of knowledge of this fact by the applicant, and no evidence showing any hereditary insanity in the family of the applicant. Upon this evidence it is claimed, in behalf of the defendant, that the plaintiff cannot recover, upon the ground that the question and answer above referred to are not confined to hereditary insanity, and that proof of the temporary insanity of an uncle of the applicant showed the answer to this question in the application to be false in a material respect, and that, therefore, the policy is void by its terms. But I am unable to agree to this construction of the question and answer under consideration. I fail to see any incongruity in the question, if it be understood as confined to hereditary disease. It may be that the diseases enumerated in the question are not in all cases hereditary, but all of them sometimes take the form of hereditary diseases; and the word "other," to my mind, plainly indicates that the question was intended to be an inquiry, whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease. This construction of the question derives support from the fact that the question is put in respect to the parents, uncles, aunts, brothers or sisters of the applicant. The point of the inquiry was, whether any hereditary taint had been developed. If this meaning of the question be not plainly expressed by its language, it is manifest that the applicant understood it in this sense; for, having answered the question by the unqualified negative "No," he then mentions the insanity of a brother, and explains how this fact is consistent with the negative he has given, by showing that the insanity of his brother was temporary; and he sums

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up his answer in the statement, "no hereditary taint of any kind in family, to my knowledge," which is equivalent to saying, "none of the hereditary diseases mentioned in the question I am answering, nor any other hereditary disease, has appeared in my family." So understood, the answer was true.

Entertaining this view of the proper construction of this application, I must adhere to the ruling made at the trial and deny the motion for a new trial.

Sewell & Pierce, for the plaintiff.

Salomon & Burke for the defendant.

THE MAGIC RUFFLE COMPANY

vs.

THE ELM CITY COMPANY. IN EQUITY.

Where a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a Court of equity, and the ultimate object of the plaintiff is to obtain damages, the Court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law.

Where a bill is brought for a discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account.

But if the relief to be ultimately rendered is the payment of damages, and a discovery is needed, and the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, then, although the case is not one of trusteeship or agency, a Court of equity will assume jurisdiction of the whole case and proceed to a final decree on the merits.

The rule of damages for the infringement of a patent considered.

If a master's report, made under an interlocutory decree, discloses facts properly

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heard by him, which, in the opinion of the Court, should be further investigated, it is competent for the Court to direct such an investigation.

(Before SHIPMAN, J., Connecticut, January 27th, 1877.)

SHIPMAN, J. The bill of complaint herein alleged, in substance, that the plaintiffs were the owners of letters patent granted to George B. Arnold, on May 8th, 1860, for a new and useful "improvement in ruffles," and that an executed agreement of license, dated February 21st, 1863, was entered into between the plaintiffs and defendants, by which the former licensed the latter to manufacture and sell the ruffle then manufactured by them, and known as the double ruffle, and the latter agreed to manufacture only said ruffle, and admitted the validity of said patent. The bill also alleged, that, after the date of said agreement, the defendants, in violation thereof and of said letters patent, made and sold many thousand yards of single ruffles, each of which contained the invention described and claimed in said letters patent, and prayed for a disclosure of all their gains and profits, and of the number of yards so made and sold, and that they account for and pay over such gains and profits, and also all damages which the plaintiffs had sustained by reason of the premises. The patent had expired before the bill was brought. The Court was of opinion, that, while the averments of the bill were sufficient to justify a Court in holding, if necessary, that it was a bill for an injury to patent rights, yet it was manifest that the pleader intended to make the alleged breach of agreement the foundation of the action, and that he sought to recover damages for an injury to the plaintiffs arising out of the violation of the contract. In reply to the objection that a bill in equity, based upon the contract, could not be sustained, because for a breach of contract there was a complete and adequate remedy at law, the Court held that it properly had jurisdiction of the case, inasmuch as the proper averments of the bill made it a bill for a discovery, and that the ascertainment of the facts from which damages are to be estimated, in case of injury to property in letters patent, is peculiarly with-

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in the province of a Court of equity, and whether, having jurisdiction, it would proceed to grant further and more complete relief, and what relief would be granted, were questions which could be determined after the master's report had been made. The Court also found, that the agreement had been broken, and that the defendants had made and sold ruffles in violation of said agreement, and which ruffles contained the improvement described and claimed in said letters patent. An interlocutory decree was passed, in which it was adjudged that the plaintiffs were entitled to a discovery from the defendants of facts from which damages for the violation of said contract could be computed and ascertained, and that an account be taken by a master to ascertain and report the number of yards of ruffles made and sold by the defendants during each year between February 21st, 1863 and May 8th, 1874, which contained the improvement claimed in said letters patent, and to ascertain the gains and profits which had been made by the defendants during the period aforesaid, from said manufacture and sale. The opinion of the Court, detailing the pleadings and the facts in the case, at length, is to be found in 13 *Blatchf. C. C. R.*, 151.

The master's report states, that, after a number of hearings and adjournments, the parties "agreed upon the number of yards of ruffling manufactured and sold by the defendants, and that the gains and profits on the whole of the goods so manufactured and sold, amounted to the sum of thirty thousand dollars, the agreement being made upon the basis of the facts proved in the examination of the business transacted in the years 1863 and 1864." The whole number of yards is 2,363,080, and the number of yards of each article, and the profits upon each, are stated in an exhibit attached to the report. The plaintiffs now ask for a final decree for the amount which has been reported by the master. The defendants insist, that, inasmuch as the Court has held that the violation of the agreement was the foundation of the action, and jurisdiction was obtained merely for purposes of discovery, and as the relief which is desired is simply the payment of

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damages for a breach of contract, the Court has not jurisdiction to grant further relief. They claim that the jurisdiction which has been exercised in ordering a discovery is exhausted, and cannot empower the Court to retain the case for the relief prayed for.

When a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a Court of equity, and the ultimate object of the plaintiff is to obtain damages, in such case the Court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. "The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief." (1 *Story's Eq. Juris.*, sec. 64 k, 8th ed.) This rule is expressed in 1 *Fonblanque's Eq.*, (book 1, chap. 1, § 3,) as follows: "The Court having acquired cognizance of the suit for purposes of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident and mistake," all of which are subjects of equitable jurisdiction. In some cases, Courts have laid down the principle more broadly, and have apparently held, that, when jurisdiction once attaches for discovery in any case, the Court will entertain a bill for relief, although no equitable relief is or could be sought, and where the only relief that can be granted is in damages. The cases of *Parker v. Dee*, (2 *Ch. Cas.*, 200,) *Ryle v. Haggie*, (1 *Jac. & Walker*, 234,) *Armstrong v. Gilchrist*, (2 *Johns. Cas.*, 424,) *King v. Baldwin*, (17 *Johns. R.*, 384,) assert this doctrine, and the language of Ch. J. Marshall, in *Russell v. Clark*, (7 *Cranch.*, 69,) if interpreted literally, and not in connection with the facts of the case, justifies the assertion. Other Courts have disclaimed this extensive jurisdiction, and have held that, where a party comes into equity for discovery merely, and this is the only ground upon which a Court of equity obtains jurisdiction, and no other equitable relief is or can be sought, the case will not be retained for purposes of assessing damages, but the parties will be remitted to an action at law. In *Middletown Bank v. Russ*, (3 *Conn.*, 135,)

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Ch. J. Hosmer says: "This brings me to consider whether a Court of Chancery, having taken jurisdiction for enforcing a discovery, will universally assume cognizance of the cause, settle every question which may arise, and grant ultimate relief. I have no hesitation in giving a negative to this question." The cases of *Hipp v. Babin*, (19 *How.*, 271,) and *Ins. Co. v. Bailey*, (13 *Wall.*, 616,) are illustrations of the indisposition of Courts of equity to entertain jurisdiction of suits which are merely for the enforcement of a legal demand. It may be regarded as generally true, that a Court of equity ought not to sustain a bill which, although it may contain matter which can give the Court jurisdiction, is merely for the assessment of damages for a breach of contract, (*Hatch v. Cobb*, 4 *Johns. Ch. R.*, 559; *Kempshall v. Stone*, 5 *Johns. Ch. R.*, 193; *Milkman v. Ordway*, 106 *Mass.*, 232); and that, where a bill is brought for discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account. (*Foley v. Hill*, 2 *House of Lords' Cases*, 28; *Frietas v. Dos Santos*, 1 *Y. & Jerv.*, 574.) There is, however, a class of cases in which the relief to be ultimately rendered is the payment of damages alone, and where the party seeking such relief needs the aid of a Court of equity for discovery, in a case which is not of trusteeship or agency, but where the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, resulting from the nature of the accounts or from other circumstances. In such cases, a Court of equity assumes jurisdiction of the whole case, and proceeds to a final decree upon the merits. In *Foley v. Hill*, (cited *supra*,) a case in which a debt against a banker for a deposit in his bank was sought to be recovered, the Lord Chancellor says: "It is not because you are entitled to a discovery, that therefore you are entitled to an account. That is entirely a fallacy, that would, if carried to the extent to which it would be carried, according to the argument at the bar, make it appear that every case is matter of equitable juria-

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diction, and that, where a plaintiff is entitled to a demand, he may come to a Court of equity for discovery. But the rule is, that, where a case is so complicated, or where, from other circumstances, the remedy at law will not give adequate relief, there the Court of equity assumes jurisdiction." To the same effect are *Corporation of Carlisle v. Wilson*, (13 Ves., 276,) and *O'Connor v. Spaight*, (1 Sch. & Lef., 305,) and the principle is fully recognized in *Fowle v. Lawraon*, (5 Pet., 495.)

In my opinion, this case comes fully within the rule which has been considered. A discovery was certainly necessary, for the facts which are embodied in the master's report required an expenditure of much time, labor and painstaking by the defendants' treasurer before they could be stated, and it would have been impracticable to obtain them in the ordinary method of trial by jury. These facts having been thus obtained, the Court is now asked to leave the parties to the remedy at law, where the main question must be, in fact, the ascertainment of damages for an injury to the patent rights of the plaintiffs, oftentimes one of the most complex and difficult questions of patent law, one which demands careful study, reflection and experience upon the part of the master, and which can often be very inadequately solved in a jury trial. The careful and accurate computation of damages in this case is a matter which will require time and labor, for, as will be seen hereafter, I do not think that all the elements from which damages are to be computed have been ascertained by the agreement of the parties.

There is another reason which induces me not to remit the parties now to an action at law. It is disclosed in the testimony taken before the master, that, since the commencement of this suit, the defendants have gone into insolvency, and their estate is now being administered upon in the Probate Court, under the insolvent system of this State. This creates no bar to an action at law against the defendants, but, as their estate is entirely in the custody of a Court for the benefit of their creditors, and a dividend can only be expected, it is for the advantage of all the parties and the creditors, that the

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dividend should not be diminished by protracted and expensive litigation and a multiplicity of suits.

It is next claimed by the plaintiffs, that the report of the master discloses all the facts from which damages can be ascertained, and that, it having been agreed that the profits of the defendants upon the ruffles manufactured and sold by them were the sum of \$30,000, such sum is the measure and rule of damages. I do not understand that, in all cases and invariably, the amount of profits upon the manufactured article is the rule of damages for an infringement. (*Cowing v. Rumsey*, 8 *Blatchf. C. C. R.*, 36; *Bell v. Daniels*, 1 *Fisher's Patent Cases*, 372.) In this case, as was stated in the former opinion "the Magic ruffle of the plaintiffs is an unfinished article, to be attached by the band to ladies' or children's undergarments. The Princess ruffle is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle. Still, the distinguishing character of the Magic ruffle is found in the Princess ruffle." The defendants' ruffles contain the patented improvement which is embodied in the Magic ruffle, but the ruffles of the two parties are different in the eye of the trade and of the purchaser. The endeavor of the Court should be to ascertain the damages which resulted to the plaintiffs from the unauthorized use of their improvement, how much the plaintiffs have lost in consequence of the violation of this contract by the manufacture and sale of the twenty-two kinds of ruffles which are mentioned in the report; and the fact that, upon the entire ruffles of the character which the defendants manufactured, they made a profit, is not sufficient to enable a Court to determine that the plaintiffs suffered that amount of damages from the use of their patented improvement. (*Mowry v. Whitney*, 14 *Wall.*, 620; *Littlefield v. Perry*, 21 *Wall.*, 205.)

There should, therefore, be a reference to a master, to ascertain the amount of damages which the plaintiffs have suffered in each year, from the year 1863 to 1874, from the breach of the contract by the use of the patented improvement in the manufacture of the ruffles which it has already been

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found were manufactured and sold by the defendants during said years.

The defendants made the point, upon the former hearing, that they had been manufacturing the Princess ruffle ever since the date of the agreement, with the knowledge and acquiescence of the plaintiffs, and were not notified that such manufacture and sale were regarded by the plaintiffs as a violation of the agreement or of the patent, until after it had expired, and about the time of the commencement of this suit; and that this claim had become stale, and should not be favored by Courts of equity, by reason of the laches of the complainants in the vindication of their rights, and their acquiescence in the assertion of adverse rights. It was said in the opinion, that, "if I was satisfied, from the evidence, that the defendants had manufactured and sold the Princess ruffle since 1862, in such quantities that the attention of the plaintiffs must have been early called to the infringement, or that they actually knew of the violation of the agreement ever since the year 1862, I should be of opinion, that their delay in making known their claim was such as to prevent them from now receiving the aid of a Court of equity to the extent of its powers." "This doctrine is found in the very nature and character of the jurisdiction exercised by Courts of equity on this and other analogous subjects." (*Wyeth v. Stone*, 1 Story, 273.) There was at that time no adequate evidence of laches on the part of the plaintiffs. It now appears, from the report of the master, that 2,359,074 yards of infringing ruffles were sold by the defendants from 1863 to 1874, in which amount is included 1,055,246 yards of the Princess ruffle, the one which was the principal subject of discussion upon the former hearing. The defendants renew their claim, from these facts, that there must have been laches on the part of the plaintiffs, who properly say that they have had no opportunity to introduce any testimony upon their part, because they did not know that the question of laches was to be made an issue before the master. Enough is brought to the attention of the Court, from the evidence properly received by the master, to show

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that the evidence in regard to laches was not exhausted in the proofs which were taken before the interlocutory decree. The order which has been heretofore passed being only interlocutory, if the master's report discloses facts, properly heard by him upon the order of reference, which, in the opinion of the Court should be further investigated, it is competent for the Court to direct such an investigation. Interlocutory orders and decrees are subject to revision until a final decree is made. (*Perkins v. Fourniquet*, 6 How., 206.) The decree should also provide that the master should take proofs as to whether the plaintiffs have had knowledge of the manufacture and sale of said ruffles which have been manufactured and sold by the defendants in violation of said agreement, and during what period of time the plaintiffs have had such knowledge, and whether the defendants have manufactured and sold said ruffles since 1862, in such quantities that it must have come to the attention and knowledge of the plaintiffs, or that they actually knew of such manufacture during said period.

The second exception to the master's report, in regard to the admission of patents subsequent to the plaintiffs' patent, is sustained. The master's report is confirmed, with said exception.

Let a dercee be passed in conformity with this opinion.

Clarence A. Seward, for the plaintiffs.

Charles R. Ingersoll and *Edwin W. Stoughton*, for the defendants.

IN THE MATTER OF LUDWIG CARSTENS, A BANKRUPT.

Under General Order No. 30, of the General Orders in Bankruptcy, adopted by the Supreme Court, April 12th, 1875, no fees can be allowed to a register, except such as are provided for by General Order No. 30, even for services rendered before such General Order was adopted.

(Before Johnson, J., Southern District of New York, January 27th, 1877.)

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JOHNSON, J. This case is brought here by Register Williams, to review a decision of the District Court in regard to his fees and compensation and other charges in this case, of which he was in charge as register. The services in question were rendered before the adoption by the Supreme Court of the United States of the General Orders in Bankruptcy, adopted April 12th, 1875. The District Judge held that General Order No. 30 left him no discretionary power to allow anything but the charges provided for in that order; and, as those in question were not thus provided for, he excluded them. In so deciding he followed his own determination in *In re Johnston*, (8 *Benedict*, 191,) where the various provisions of the statutes bearing upon the question are collected and considered. That case related to the fees of the marshal, but there is no substantial distinction in this respect between the marshal and the register. *In re Gies*, (12 *Nat. Bkcy. Reg.* 179,) arose in the Eastern District of Michigan, and related to the fees of attorneys. Judge Brown held that he must be governed by the new General Orders, in the allowance or disallowance of fees for services rendered before those orders were adopted. In my opinion, General Order No. 30 requires that construction. In regard to the register the provision is: "The following and no other fees shall be allowed to the register." Then follows the detail of allowable charges, which does not include those in question in this case. The last clause of this General Order provides for the taxation of the bills of the clerk, marshal and register. Each of them is to file a statement of fees, including prospective fees for final distribution, which must exhibit by items each service and the fee charged for it. The clerk must tax each fee bill, allowing none but such as are provided for by those rules, which taxation is conclusive, unless altered by the Court. There is no foundation for the idea that the Court can make any other taxation than such as the clerk ought to have made. There was, therefore, no legal right to award to the register the amounts which have been disallowed by the District Court.

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The order of the District Court must be affirmed, but without costs against the register, in this Court.

Isaiah T. Williams, the register, in person.

Thomas H. Barowsky, opposed.

THE AMERICAN DIAMOND ROCK BORING COMPANY

vs.

THE SULLIVAN MACHINE COMPANY AND OTHERS. IN EQUITY.

The invention set forth in reissued letters patent No. 3,690, granted to Asahel J. Severance, assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill," the original letters patent having been issued to said Leschot, July 14th, 1863, defined.

It is not limited to an annular boring head, but covers a convex boring head.

A constructor of a machine infringes, if he makes his machine with express reference to a result which he knows will happen when the machine is put to its use, and which result, if originally introduced in the machine, is an infringement.

It is not proper to grant a motion for a preliminary injunction on a patent, on a theory which, although it may be true, is not supported by affidavits.

(Before SHIPMAN, J., Southern District of New York, January 29th, 1877.)

SHIPMAN, J. This is a motion for a preliminary injunction to restrain the defendants from the infringement of reissued letters patent No. 3,690, issued to Asahel J. Severance, as assignee of Rudolph Leschot, and dated October 26th, 1869, for an "improved rock drill." The original patent was issued to Rudolph Leschot, and dated July 14th, 1863. The plaintiffs became the owners of said reissued patent on June 4th, 1875. The American Diamond Drill Company, the assignor of the present plaintiffs, brought in this Court, in the year 1872,

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their bill in equity against the Sullivan Machine Company, one of the present defendants, for an injunction against an infringement of this patent, and, after a full hearing upon proofs, a decree directing an injunction was entered in April, 1875. The injunction was duly served upon said company. As no opinion was filed in that case, it becomes necessary to state briefly the facts which were found by the Court in regard to the patent, the invention and the infringement, in order to a proper understanding of the questions which are at issue upon the present motion.

The invention and tool of Leschot are described in the re-issued patent as follows: "This invention consists in a boring tool composed of a series of diamond edges, attached to an annular or tubular stock or crown, of steel or other metal, to which a rotary and a direct forward motion are given, and which is thereby caused to cut or bore an annular groove or hole, leaving a central core or kernel, which is easily detached by the subsequent operation of a gad or wedge. It also consists in the combination with the described boring tool, of a tubular boring bar or drill rod, whereby motion is imparted to the boring head, and through which a stream of water is forced, as hereinafter set forth. * * * * A is the annular or tubular socket or crown, of steel or other metal; a , a^1 , a^2 , are edged cutters, composed of diamonds fitted and set firmly into suitable notches or mortices in the face of the crown or stock A. These diamonds are such as, from their color, are least valuable for jewelry. They are respectively so arranged in the crown or stock A, that the cutting edges of some project in a forward direction from the face or front end of the said crown or stock, as illustrated by a , a , while the edges of others project outwardly from the outward periphery thereof, as illustrated by a^1 , a^1 , and the edges of others project inwardly from the inner periphery, as illustrated by a^2 , a^2 . This crown or stock is secured by a bayonet fastening, or other means, to a tubular boring bar, of any suitable length, whose outer diameter is not greater than that of the said crown or stock, and whose inner diameter is not less than that of the said crown

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or stock, and this bar is arranged to form part of a machine of suitable construction, or otherwise furnished with suitable mechanical appliances, according to the nature of the work to be performed, by which it has imparted to it both a rotary and a direct forward or feeding motion, whereby it is caused to cut or bore an annular groove or hole in the rock or other hard body upon which it is employed. The operation of the tool will be greatly assisted by the injection of a stream of water through the tubular boring bar and crown or stock, for the purpose of washing out and carrying away the detritus which is produced, and which would otherwise choke up the annular opening and impede the action of the tool." The second and third claims of the reissued patent, which are, perhaps, the only claims which it is important now to consider, are: "2. The row of cutting edges a^1 , when attached to a revolving boring head, so as to project beyond the circumference thereof; for the purposes specified. 3. In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof, a hollow central drill rod, through which the water is forced or passed."

The device of the defendants, which was in controversy in the case of the American Diamond Drill Company, was a boring tool, consisting of a hollow boring head, convex upon its surface, having two holes extending from the cavity on the inside to the outside surface. The convex surface is armed with diamonds, which project from the surface, and a portion of which diamonds project outwards from the periphery. The only difference between the two devices is, that Leschot's drill abrades only a portion of the rock, the annular boring head acting upon the rock in such a manner as to enable an annular groove to be formed in the stone by the rotary and progressive motion of the boring head, and to leave a core within the groove. This core was subsequently removed by wedges. The defendants' tool abraded the entire surface of the rock through which it passed. Each instrument was provided with diamonds, the cutting edges of which extended outside of the periphery of the boring head, so that a larger

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hole was formed than the diameter of the boring head, and each was attached to a hollow bar, through which water was passed to wash out the detritus, the water being injected through the tubular boring bar and the boring head, and escaping, in the Leschot tool, through the annular boring head, and, in the defendants' device, through the two holes upon the convex surface of the boring head.

From an inspection of the defendants' drill and the re-issued patent, it was obvious that the terms of the second and third claims of the patent were infringed. The defendants' drill was an exact imitation of the plaintiffs' device, with the exception, that, in place of the annular boring head, was substituted a convex boring head, with two holes in its surface. The annular head was partially plugged, so that the entire surface of the rock could be abraded. It may have been, and, perhaps, was, an improvement upon Leschot's tool, but an improvement which required little, if any, invention. It contained the principle of Leschot's invention, which was the effecting a clearance, by diamond points projecting beyond the periphery of a revolving and progressing boring head, so that the drill should not be clogged by the detritus, and the combination of the cutting mechanism with the hollow drill rod, into and through which, and through the orifice in the boring head, water could be injected, for the purpose of washing out the detritus. The distinctive features of the invention, as detailed in substance by the plaintiffs' expert, were, in combination, 1st. The boring head, adapted to being revolved and progressed or moved forward; 2d. Cutting points of diamonds, projecting beyond the periphery of the said boring head, so that they will cut a hole of larger diameter than the boring head, and so as to give a clearance; 3. A hollow drill rod or boring bar, adapted to connecting the boring head with mechanism for causing it to revolve and progress, and also adapted, by reason of its tubular form, to permitting the injection of a stream of water through the orifice in the boring head, for the purpose of washing out and carrying away the detritus which is produced by the abrasion of the stone by the diamond points.

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These distinctive features were all found in the defendants' drill.

An earnest attempt was made to avoid the effect of the infringement, by the claim that the reissued patent is for an invention different in kind and character from the one which was claimed in the original patent. It is not different from the one which was described in that patent. But it was contended that the original patent was for an annular tool and was confined to such a tool. That Leschot attributed importance to the annular character of his invention is plain, but that his invention was not limited to an annular tool is equally plain. He described fully the manner in which the diamonds were placed, whereby a larger diameter was given to the hole which was cut than the diameter of the boring head. The reissued patent embraces merely what was not only substantially but fully indicated and described in the original specifications, drawings and model.

It was also claimed, that there was no novelty in Leschot's invention, by reason of the prior French inventions of Georges Hermann and M. Fauvelle. Hermann's mechanism was originally for polishing a fashioning stone. His patent was subsequently enlarged, by a "certificate of addition," so as to include the cutting of stone by diamonds at the bottom of an annular head. It did not embrace all the features of Leschot's invention, and, especially, was not designed or adapted to make a clearance by projecting diamonds, and had not the hollow boring bar, for the introduction of water. The Fauvelle device was for an instrument which acted by percussion. The combination of a cutting or abrading tool with a hollow boring bar was novel.

A decree was passed which declared that the defendants' drill was an infringement of the second claim of the plaintiffs' patent. It was equally an infringement of the third claim, and a decree declaring that the third claim had been infringed would have been passed, if it had been desired, or if it had been deemed important.

Subsequently to the service of the injunction order, the

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defendants altered their drill, so that the diamonds were placed flush or even with the periphery of the boring head. The present bill was brought for the purpose of testing the question, whether or not the drills, as now used by the defendants, are or are not an infringement.

Upon the hearing of this motion, two affidavits were presented by the plaintiffs, to the effect that the defendants use, in a marble quarry in this District, boring heads or bits, on which the diamonds in fact project between $\frac{1}{32}$ d and $\frac{1}{16}$ th of an inch beyond the outer circumference of the drill heads. The plaintiffs, admitting that the diamonds may have been originally set flush with the circumference, say that the inevitable result of use is, that the steel head wears away by contact with the marble, and leaves the diamonds projecting; that the defendants intentionally placed the diamonds in such a position that use would inevitably cause a projection; and that such a construction is a mere evasion and an infringement.

It is true, that, "if a machine is constructed so as to conform in all respects to the description in a patent, except as to one particular, or as to one motion and effect, yet is so constructed and intended as to obtain that motion or effect in the usage of the machine, by the action or wearing of the parts, and it is so obtained, it is a piracy of the principle, and a violation of the patent." (*Page v. Ferry*, 1 *Fisher's Patent Cases*, 298.) If the object, in placing the diamonds flush with the circumference, was, that, when put to use, they should inevitably become projecting, there is an infringement. A constructor of a machine infringes, if he makes his machine with express reference to a result which he knows will happen when the machine is put to its use, and which result, if originally introduced in the machine, is an infringement.

The defendants have presented thirteen counter affidavits, which are generally to the effect that a new flush-set diamond drill head performs its work in a marble quarry better than one which had become so worn by use that the diamonds project; that the new flush-set head makes a hole in marble

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larger than the diameter of the head ; that this clearance is effected not by the cutting of the marble by the projecting diamond edges, but because the material of which marble is composed is crystalline, and, as the convex drill head advances into the marble, the crystals are fractured, and crumble for a little space exterior to the diameter of the head ; that the steel circumference of the head is worn away by the attrition of the detritus as it is carried to the surface, and not by the attrition of the steel against the solid marble ; and that it is not necessary that the metal should be worn away from the diamonds in order to make the drill operative, but that the wearing of the metal injures the head for boring purposes. If these affidavits are true and will endure the test of cross-examination and rebutting testimony, while the position of the diamonds was changed in order to avoid the charge of infringement, yet it cannot be found that the intent, in setting the diamonds flush with the circumference, was that they should speedily become projecting by wear and use, or that the object of the defendants was to have a projecting diamond drill.

The plaintiffs, in reply, urge, in argument, that the diamonds were so placed that the drill head must describe an eccentric movement, and that the effect of this construction is that the diamonds practically project. They say, "that the diamonds are so set on the conical head of the bit that they must cause the bit to revolve eccentrically, whereby a diamond on the periphery will describe a circle of larger diameter than the diameter of the metallic head in which they are mounted," and that this method of setting "is a mere mechanical equivalent for projecting the diamond radially outward from the head." No affidavits were presented from experts or others in support of this proposition. It is hardly proper to grant a motion for preliminary injunction upon a theory which, although it may be true, is not supported by affidavits. In view of the testimony now offered I think that the motion for an injunction should be denied, and that the questions which are at issue should be left to final hearing upon proofs.

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The motion for a preliminary injunction is denied.

Charles F. Blake and *Benjamin F. Thurston*, for the plaintiffs.

Edwin T. Rice and *Edward N. Dickerson*, for the defendants.

THE UNITED STATES vs. JOHN PELLETREAU.

Under § 5467 of the Revised Statutes, an indictment will lie which charges a person employed as a letter carrier in the postal service, with having embezzled a letter which was intended to be conveyed by mail and contained an article of value, and had been entrusted to him, and had come into his possession as such letter carrier.

Said § 5467 is not conferred to the offence of stealing or taking things out of a letter, packet or bag.

(Before BENEDICT, J., Eastern District of New York, February 5th, 1877.)

BENEDICT, J. This is a motion to quash an indictment framed under § 5467 of the Revised Statutes of the United States, upon the ground that the facts stated do not constitute an offence. The averments of the indictment are, that the accused was a person employed as a letter carrier in the postal service of the United States, and embezzled a certain letter, described, which was intended to be conveyed by mail, and which contained an article of value, described, which said letter had been entrusted to the accused, and had come into his possession as such letter carrier. The contention in behalf of the accused is, that the only offence created by § 5467 is that of stealing or taking things out of a letter, packet or bag. The section is in these words: "Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and

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which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post office or branch post office established by authority of the Postmaster-General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock, or other pecuniary obligation or security of the Government, or of any officer or fiscal agent thereof, of any description whatever; any bank note, bank post bill, bill of exchange, or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing; any receipt, release, acquittance, or discharge of or from any debt, covenant or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery, or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years." It is contended that this section omits to say that persons doing any of the acts that are mentioned in the section prior to the last semicolon in it shall be liable to punishment, and makes punishable only the acts mentioned after the words "any such person who shall," following the semicolon. But this construction of the section is entirely too strict even for a criminal statute. It is conceded, that, if . .

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the conjunction "and" had been inserted between the semicolon and the words "any," the statute would be complete. But, the omission of the conjunction, by way of ellipsis, in such statutes, is a very common thing. Sections 5463 and 5464 just above, present several instances of such omissions. The intention of the statute is as plain without the conjunction as with it. Manifestly, two classes of offences are intended to be created, one relating to the embezzlement of letters, &c., the other relating to stealing the contents of letters; and this intention is carried out if we suppose an ellipsis, while, without an ellipsis, a very considerable part of the section is useless and void. According, then, to the familiar rule of construction, the statute should be read so as to render its language effective, and, by inserting the conjunction, this is done. So read, it creates the offence charged in the indictment. The motion to quash is, therefore, denied.

Asa W. Tenney, (District Attorney,) for the United States.

John J. Allen, for the defendant.

GEORGE HARRINGTON vs. JAMES L. LIBBY.

The exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with the collars, cannot be claimed as a trade-mark, either under the statute or by virtue of the general law of trade-marks.

(Before JOHNSON, J., Southern District of New York, February 8th, 1877.)

JOHNSON, J. The plaintiff claims to be entitled to the exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale and sold with the collars. This claim is made not on the ground, that he is the inventor and patentee

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of pails thus made, or of the material used in making them, or of the art of selling collars by giving away a tin pail with them. But the claim is that this is a trade mark, and entitled to protection as such, either by force of the statute of the United States on the subject, or by virtue of the general law of trade marks. It appears that the ornamented tin pail which the plaintiff employs is a common article in commerce, and that pails made of tin, ornamented or unornamented, are and have long been in use for all such purposes as any one chose to apply them to. The question whether any one can seize upon such an article and make title to its exclusive use for a special purpose, by calling it a trade mark, must be far from clear in favor of the claimant. The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers, until some one, bolder than the others, might go to the very root of things, and claim for his goods the primitive brown paper and tow string, as a peculiar property. It will be observed, that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by the ornamental pattern. There is no name, no symbol, no assertion of origin or ownership. The case strongly resembles that of Payson's Indelible Ink, (*Browne on Trade Marks*, §§ 271, 272,) where the claim was rejected, on the ground, that, if maintained, the effect would be to gradually throttle trade. The case of *Moorman v. Hoge*, (2 *Sawyer*, 78,) seem to me quite in point. In favor of maintaining the right to the barrel in question in that case, all circumstances of fact concurred, but the Court held that the law did not recognize an exclusive right to an unpatented package, nor permit its assertion. I concur in the principles maintained in that case, and think the plaintiff has failed to show such a right in the premises as can entitle him to a preliminary injunction. The motion must be denied.

James A. Whitney, for the plaintiff.

Edmund Wetmore, for the defendant.

In re Wm. H. Brightman and Hiram B. Losee, Bankrupts.

IN THE MATTER OF WILLIAM H. BRIGHTMAN AND HIRAM
B. LOSEE, BANKRUPTS.

Under § 5108 of the Revised Statutes, as amended by the Act of July 26th, 1876, (19 *U. S. Stat. at Large*, 102,) which limits the time within which a bankrupt may apply for a discharge from his debts, to a time "before the final disposition of the cause," it is too late for him to apply for a discharge after his assignee has, under § 5096, been discharged from all liability, as assignee, to any creditor.

The words, "the final disposition of the cause," mean the final disposition of the administration of the estate.

(Before JOHNSON, J., Northern District of New York, February 12th, 1877.)

JOHNSON, J. This is a petition by the bankrupts, to review the decision of the District Judge refusing their application for an order to show cause why they should not be discharged from their debts. The refusal was placed upon the ground that there had been a final termination of the matter prior to the application for discharge. The adjudication was made on the petition of creditors, on the 22d of December, 1873, declaring the petitioners to be bankrupts. On the 20th of May, 1876, the accounts of their assignee were settled, and the assignee was discharged, in pursuance of section 5096, from all liability, as assignee, to any creditor of the bankrupts. The bankrupts aver, in their petition for a discharge, which bears date November 13th, 1876, that they have duly surrendered all their property and rights of property, and fully complied with and obeyed all the orders of the Court touching their bankruptcy. The question thereupon arises, whether their application for a discharge was brought within the period fixed by section 5108 of the Revised Statutes. That section was amended by the Act of July 26th, 1876, (19 *U. S. Stat. at Large*, 102), and the section, as amended, was declared to apply in all cases theretofore or thereafter commenced. The amendment consisted in the substitution of the words "before the final disposition of the cause," in place of the words "within one year from the adjudication of bankruptcy."

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Before the amendment, the section read as follows: "At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the Court for a discharge from his debts." Upon the construction of this section judicial opinions were not altogether in harmony. In some of the Districts it was held that, where application for a discharge could not be made till after six months from the adjudication, it might be made at any distance of time after that period; in some, that the limitation of one year from the adjudication applied to all cases, as well those where the application for a discharge might be made after sixty days, as where it could not be made until after the lapse of six months. One especial grievance was, that a fixed period of a year should limit the right to apply for a discharge, although the affairs of the bankruptcy were during all the time involved in litigation, which was not terminated at its expiration. It was under these circumstances that the amendment was made. If the legislative intention had been to fix no limit of time after which the bankrupt could not apply for a discharge, that intent would have been unmistakably effected, by striking out the limiting phrase instead of altering its terms. Then it would have been plain, that at any time after the right to apply arose, under the provisions of the section, the bankrupt might make his application for a discharge. This, however, Congress did not do. It has substituted for the fixed period of a year, the indefinite and varying period indicated by the phrase, "before the final disposition of the cause." If, then, we inquire what, in the sense of this section, is "the final disposition of the cause," it must be replied, that it is an event which may occur before the bankrupt has applied for a discharge, because it is made to fix the period before the expiration of which his application must be made. We cannot read it to mean that the bankrupt may apply to the Court for his discharge at any time

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before the Court has finally acted upon an application by him for a discharge. We are forced, therefore, to conclude that a final disposition of the cause may have taken place, although no application for a discharge has been made, and no action of the Court had upon the subject. A cause in bankruptcy consists of two parts. The one embraces the administration of the estate, the other the matter of the bankrupt's personal discharge. According to the section of the statute in question, the application by the bankrupt for his discharge must be made before the final disposition of the administration of the estate. When the bankrupt has surrendered all his property, and the assignee, having administered it, and rendered his accounts, has been discharged by the Court, the cause is ended. Nothing remains pending in the Court, unless the bankrupt has made application for his discharge. The practice of the District Courts affords no other definition of "the final disposition of the cause." There never in practice occurs any formal order of the Court declaring the proceedings closed. A final disposition has taken place when the actual litigations are ended and the administration of the estate is closed. I think it was the purpose of Congress to require the application for a discharge to be made before the administration of the estate should be completed; and I do not find in the language of the amended section any ground upon which I can extend the time beyond the actual termination of the pending proceedings for the administration of the estate. The order of the District Court must be affirmed.

Edward F. Bullard, for the bankrupts.

Raymond v. The Danbury and Norwalk Railroad Company.

EBENEZER W. RAYMOND

v8.

THE DANBURY AND NORWALK RAILROAD COMPANY.

In an action of tort, in a Court of the United States, where the defendant suffers a default, the plaintiff has no constitutional right to have the damages assessed by a jury.

Such assessment is a matter of practice, and may be made according to the practice of the Courts of the State in which the Federal Court is held.

In Connecticut, such assessment may be made by the Court.

(Before SHIPMAN, J., Connecticut, February 15th, 1877.)

SHIPMAN, J. This is an action of tort, to recover damages for an injury to the plaintiff, arising from the negligence of the defendants. The defendants have suffered a default, and have thereby admitted a cause of action, as alleged, but not the alleged extent of the injury, and the question now before the Court is as to the tribunal by which the quantum of damages is to be ascertained. The plaintiff insists that he has a constitutional right to have the questions of fact in regard to damages determined by a jury, while the defendants assert, that, in accordance with the practice of the State Courts in Connecticut, the damages are to be assessed by the Court.

The seventh amendment to the Constitution of the United States provides, that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." By the first clause of the amendment, the right of trial by jury, in common law actions, was guaranteed. The right, and the same right, of jury trial, which then existed, was to remain undisturbed. In some of the State Constitutions, the same idea is expressed by the phrase, "shall remain inviolate." By

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the common law, at the date of the adoption of the Constitution, the trial of all issues of fact must be by a jury. By issues of fact are meant questions of fact, as distinguished from questions of law, which the result of the pleadings in each case shows to be in dispute or controversy between the parties; and a jury trial in issues of fact was the right of the litigant. In harmony with the constitutional right afterwards guaranteed by the seventh amendment, Congress provided, in the twelfth section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79, 80,) that the trial of all issues of fact shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury. But the assessment of damages, upon a default, either in actions of tort or of contract, stood upon a different footing from the trial of issues of fact. In the early history of the common law, the subject of the ascertainment of damages was in some confusion. The Courts frequently fixed the amount of damages on a judgment by default and on demurrer, (*Rolle's Abridgment*, *Tit. Damages*;) and, "though the justices use to award inquest of damages, when they give judgment by default, yet they themselves may tax the damages, if they will." (*Sedgwick on Damages*, 598; *Viner's Abr., Damages*, I.) Courts had also the right of revising the amount of damages which had been assessed upon a writ of inquiry. In 1765, the date of the publication of the first volume of Blackstone's Commentaries, the practice had become settled, that, upon a default, damages should be assessed upon a writ of inquiry, by a sheriff's jury; but a practice was "established in the Courts of King's Bench and Common Pleas, in actions where judgment is recovered by default upon a bill of exchange or a promissory note, to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry." (3 *Black. Comm.*, by *Sharswood*, 398, note 11.) In 1848, before the enactment of the statute of 15 and 16 Vict., (*ch. 76, sec. 94*,) in regard to the ascertainment of damages by a master, in actions of contract, it is said, in *Whitaker v. Harold*, (12 *Jurist*, 395,) an action of covenant,

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that the Court of Queen's Bench had the power to assess damages, on demurrer or default, without the intervention of a jury. The assessment of damages by a jury, in actions of tort, was, however, a matter of practice, and not of right. Chief Justice Wilmot held, in 1770, as had been previously declared in 1764, that a writ of inquiry, in an action of tort, is an inquest of office, to inform the conscience of the Court, which could itself have assessed the damages, without any inquest. (*Beardmore v. Carrington*, 2 Wils., 244; *Bruce v. Rawlins*, 3 Wils., 61; 2 *Finlason's Reeve's History of English Law*, 610.)

In the 26th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 87,) Congress provided, that, in all causes to recover the forfeiture annexed to any article of agreement, covenant, bond, or other specialty, where the forfeiture, breach or non-performance shall appear by the default or confession of the defendant, or upon demurrer, the Court shall render judgment therein for the plaintiff, to recover so much as is due according to equity; and that, when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury. This section is reproduced in section 961 of the Revised Statutes. No provision was made for assessing damages in actions of tort. By the 17th section of the same Act, the United States Courts were empowered to establish all necessary rules for the orderly conducting of business in said Courts, provided such rules were not repugnant to the laws of the United States. It is said by Judge Washington, in *Golden v. Prince*, (3 *Wash. C. C. R.*, 313,) in speaking generally of the rules of practice, that the different Circuit Courts, at their first sessions, adopted the State practice as it then existed. In 1797, the Supreme Court decided, in *Brown v. Van Braam*, (3 *Dall.*, 344), upon a writ of error from the Circuit Court for the District of Rhode Island, that the assessment of damages after a default, in a suit upon a foreign bill of exchange, by the Court, instead of a jury, under the practice and laws of that State, was correct, Judge Chase observing, that he concurred in the opinion of the Court, upon common law principles.

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The practice in this State, at the date of the adoption of the Constitution, in regard to the assessment of damages, is easily ascertained. Judge Swift, in his *System*, published in 1796, says: "Our Courts possess the same power to assess damages as a jury in England, upon a writ of inquiry issued to the sheriff for that purpose. There, in these cases, the Court must issue a writ to the sheriff, commanding him, by twelve men, to inquire into the damages, and make return to the Court, which process is called a writ of inquiry. The sheriff sits as judge, and there is a regular trial by twelve jurors, to assess the damages. This mode of proceeding must be productive of expense and delay; and the practice of this State, introduced by our Courts, without the authority of a statute, of assessing the damages themselves, without the intervention of a jury, is one of the many instances in which we have improved upon the common law of England." (2 *Swift's System*, 268.) This practice of the Courts was afterwards sanctioned by statute, (*Revision of 1821, sec. 59, p. 50,*) and has remained the law of the State ever since.

The practice of the United States Courts, in the different Circuits, has not been uniform. The more common method has been to assess damages by a jury, upon a writ of inquiry, but it is believed that the practice has conformed to the usages of the State in which the Circuit Court was held. (2 *Abbott's U. S. Practice*, 50.) In this District, neither the custom of calling in a marshal's jury to assess damages, nor the assessment by a petit jury, under the direction of the Court, has prevailed.

The conclusion is, that the assessment of damages by a jury, upon a default, is matter of practice, and not of right; and that the assessment should be made in this case according to the uniform practice of the State Courts. Let the damages be assessed by the Court, or, if the parties agree, by the clerk, as committee, to find and report the facts and the amount of damages.

William R. Smith, for the plaintiff.

Calvin G. Child, for the defendants.

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In re Jean B. H. Vandervelpen, on Habeas Corpus.

IN THE MATTER OF JEAN B. H. VANDERVELPEN AND JEANNETTE
DAMAS, HIS WIFE, ON HABEAS CORPUS.

The extradition treaty between the United States and Belgium, (18 *U. S. Stat. at Large*, 804,) declares that its provisions shall not apply to any crime committed prior to the date of the treaty, except murder and arson. The date of the signing of the treaty was March 19th, 1874. It was not to take effect until 20 days after the day of the date of the exchange of ratifications. They were exchanged April 30th, 1874: *Held*, that a crime committed in Belgium on the 1st of May, 1874, was covered by the treaty.

Where an extradition case, under a treaty, is brought before a United States Commissioner, it is his judicial duty to judge of the effect of the evidence, and no other judicial officer has any power to review his action thereon.

(Before JOHNSON, J., Southern District of New York, February 20th, 1877.)

JOHNSON, J. These persons being in the custody of the marshal of the Southern District of New York, in extradition proceedings had before Kenneth G. White, a Commissioner of the Circuit Court, specially authorized to entertain such proceedings, upon the warrant and decision of such Commissioner against them, have been now brought before me by writ of *habeas corpus*. The question I am to consider is, whether the restraint and imprisonment of the petitioners is lawful, for it is only from unlawful restraint and imprisonment that parties can be freed by means of the writ of *habeas corpus*.

The extradition of persons charged with crimes alleged to have been committed, is regulated by the Revised Statutes, Title 66, in conjunction with the particular treaty or convention applicable to the case. Section 5270 covers the whole authority and procedure of the magistrates of this country in these proceedings. It provides as follows: "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign Government, any Justice of the Supreme Court, Circuit Judge, District Judge, Commissioner, authorized so to do by any of the Courts of the United States, or judge of a Court of record, of general

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jurisdiction, of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District or Territory, with having committed within the jurisdiction of any such foreign Government, any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign Government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." The authority of this law cannot be and is not denied, and it necessarily follows that an imprisonment in pursuance of it is lawful. The treaty for extradition under which these parties have been charged, is between the United States and Belgium. The officer who has acted under the law is one of those upon whom it confers the power of acting. For the purposes of this law, each of the enumerated officers possesses the same authority, so that it is indifferent, for all legal purposes, whether he is the Chief Justice of the Supreme Court of the United States, or only a Commissioner authorized to act by any of the Courts of the United States. Each of them derives his power not from his official station, but from the delegation of power conferred by this Act. A complaint under oath was made before this officer, charging these parties, who were found within the limits of a State, with having committed within the jurisdiction of Belgium a criminal offence provided for by that treaty. The offence thus charged was uttering a forged obligation, with intent to defraud, on and after the 1st day of May, 1874. It is provided

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for by subdivision 5 of article 2 of the treaty. (18 *U. S. Stat. at Large*, 804.) Article 3 declares, that the provisions of the treaty shall not apply to any crime or offence committed prior to the date of the treaty, except murder and arson. The date of the signing of the treaty is March 19th, 1874. By article 8, it was not to take effect until twenty days after the day of the date of the exchange of ratifications. These were exchanged April 30th, 1874, and the treaty did not take effect until twenty days thereafter. But, when it did take effect, it operated according to its terms. The reference in article 3 was to the date of the treaty, which was either the date of the signing, or the date of the exchange of ratifications, and not the time of its taking effect. The offence charged, therefore, is included, in respect to time as well as to substance, within the provisions of the treaty. The warrant issued by the magistrate, on which the prisoners were arrested, follows the complaint, and directs the apprehension of the persons charged, and that they be brought before the Commissioner who issued the warrant, to the end that the evidence of criminality may be heard and considered. The statute and the treaty have thus far been exactly followed by the Commissioner, who thereupon became clothed with all the authority that the treaty and the statute confer in this behalf. When it is remembered that the treaty and the statute create the power, and that judicial intervention takes place only because they prescribe it, and that no review, by judicial authority, of the action of the officer who executes the power, is provided by either treaty or statute, no ground is apparent upon which such a review can be claimed. The jurisdiction of the Commissioner is complete when the prisoners are brought before him under the statute and treaty, upon a charge provided for by the treaty. He is then to hear and consider the evidence of criminality, in the exercise of his jurisdiction. If, on the hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty, he must certify the same, together with a copy of all the testimony taken before him, to the Secretary of State. In this case, a mass of evi-

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dence was adduced before the Commissioner, authenticated according to the provisions of the Act of June 19th, 1876, (19 *U. S. Stat. at Large*, 59,) and relating to the charges against the prisoners. Of the effect of this evidence, it was the judicial duty of the Commissioner to judge, and neither the duty nor the power to review his action thereon has been conferred upon any other judicial officer. If he deems it sufficient, the statute prescribes his further action in the premises. It then rests with the Executive authority to determine, in the last resort, what is demanded by justice and the obligations of the treaty. If it appears to the President, upon a review of all the evidence, that the charge is not sustained, and that justice and the obligation of the treaty do not require the surrender of the prisoners, he can refuse it, and they can be set at liberty, either under the provisions of section 5273 of the Revised Statutes, or in any other appropriate manner.

The whole subject involved in this case has received very careful and ample examination, in this Circuit, in the case of *In re Stupp*, (12 *Blatchf. C. C. R.*, 501,) where all the previous cases are fully examined by Judge Blatchford. His opinion in that case was concurred in by Judge Woodruff, and their decision established the law in this Circuit. I consider it my duty, and my judgment agrees with their views, to apply that decision to this case. I abstain from expressing any opinion upon the effect of the evidence. Having, as I think, no right to make that opinion effectual in case it differed from that of the Commissioner, I think it only suitable to withhold it all together.

The writs must be discharged, and the prisoners remanded to the custody from which they were taken.

William D. Shipman and *Emmet R. Olcott*, for the relators.

Frederic R. Coudert, for the Belgian Government.

Mulford v. Pearce.

LEWIS J. MULFORD AND OTHERS

vs.

THOMAS D. PEARCE AND OTHERS. IN EQUITY.

In the case of a patent for an ornamental chain, as a new article of manufacture, where there is a difference in kind between the patented chain and prior chains, and where what was open to the public could not make a chain like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by him by the infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chain over what advantage he would have had from using what was so open to the public.

(Before SHIPMAN, J., Southern District of New York, February 21st, 1877.)

SHIPMAN, J. The defendants except to the master's report in regard to the amount of damages found to have been sustained by the plaintiffs, by reason of the infringement of their patent. The principal exception is stated in two forms—that, inasmuch as the defendants had a right to make chains of alternate links, and to use tubing for one link, provided it was soldered so as to make that link closed, the question to be determined by the master was, 1st, What advantage was derived by the defendants from using the open links over what they would have had in using closed links made of tubing? or, 2d, What advantage have the defendants gained, by reason of having used open spiral links of gold tubing, over what would have ensued from the use of open spiral links of solid wire?

The patented article was a new ornamental chain or necklace, a new article of manufacture, and the first claim has been held by this Court to be a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing. (*Mulford v. Pearce*, 13 *Blatchf. C. C. R.*, 173.) The distinctive feature of the invention, it was held, did not consist in the fact that the link was spiral, but

did consist in the construction of the open spiral link from a specified material, viz., gold tubing. The two elements of utility and novelty which the new article possesses are described in the opinion, in which it was shown that these elements did not exist either in a soldered chain of tubing, which could not be taken apart, and which required finishing and polishing after it was put together, or in a chain made of split gold rings of solid wire. It was said that the difference between the latter article and the patented chain was clearly marked and was a difference in kind. The patented and the unpatented articles are entirely distinct from each other. By the use of closed or soldered links of tubing, or links of solid wire, the manufacturer cannot obtain the result which is found in the patented invention, and, therefore, the principle which was decided in *Mowry v. Whitney*, (14 Wall., 621,) and which is invoked by the defendants, is not applicable. That was a case of a new process of manufacture, and the Court say that the proper inquiry was, what was the advantage in bringing the article by the patented process to a state of perfection, over bringing it to the same state by other processes open to the public, and which would be equally beneficial. In this case, the links of a chain which are open to the public, cannot, from their nature, make a chain which is like the patented article in its peculiar characteristics. The master might as well undertake to estimate the advantage which the patented article possesses over any other gold chains, as over those which the defendants have selected.

The master seems to me to have observed, in this case, the rules which have heretofore been sanctioned by the Circuit and Supreme Courts. The cases of *Buck v. Hermance*, (1 Blatchf. C. C. R., 398,) *Pitts v. Hall*, (2 Blatchf. C. C. R., 229,) *Cowing v. Rumsey*, (8 Blatchf. C. C. R., 36,) *Livingston v. Jones*, (2 Fisher's Patent Cases, 207,) *Seymour v. McCormick*, (16 How., 480,) are in point.

In regard to the motion for treble damages, I do not perceive any adequate reason which calls upon the Court to exercise its discretionary power to increase the actual damages.

Bayless v. The Travellers' Insurance Company of Hartford.

The master's report is confirmed, and the exceptions are disallowed. The motion to increase the damages is denied.

Benjamin F. Lee, for the plaintiffs.

Henry Baldwin, Jr., for the defendants.

KATE J. BAYLESS

vs.

THE TRAVELLERS' INSURANCE COMPANY OF HARTFORD.

A policy of insurance against accident provided for the payment to the plaintiff of a specified sum within a specified time, after sufficient proof that the insured "shall have sustained bodily injuries effected through external, violent and accidental means," "and such injuries alone shall have occasioned death," "provided, that this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation or medical or mechanical treatment for disease." A specified dose of opium was prescribed to the insured by his physician, to allay nervousness and restlessness. By inadvertence, he took more opium than he intended and his death was caused thereby: *Held*, that his death was caused wholly or in part by medical treatment for disease, and was not covered by the policy. *Held*, also, that the case was not one of bodily injury effected through external, violent and accidental means, occasioning death, within the meaning of the policy.

(Before BENEDICT, J., Eastern District of New York, February 24th, 1877.)

BENEDICT, J. This action is brought upon a policy of insurance against accident, issued by the defendants, whereby they agreed to pay to the plaintiff the sum of \$10,000, "within ninety days after sufficient proof that the insured, William E. S. Bayless, at any time within the continuance of the policy, shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of this contract, and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety

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days from the happening thereof." The contract contained the following proviso: "Provided, that this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation, or medical or mechanical treatment for disease." The cause was tried before the Court and a jury, when, upon the evidence adduced, a verdict for the plaintiff was directed, subject to the opinion of the Court upon the question whether the facts proved were sufficient to render the defendants liable upon their policy. The following are the facts, as derived from the evidence, and, in stating them, I adopt the conclusions of fact most favorable to the plaintiff, that the evidence will permit to be drawn. The insured died on the 20th of November, 1872. A week or so previous to his death he was suffering from influenza, the result of a cold, and was then treated therefor by his physician. He began to get better, when, on Friday night before his death, he had an attack of cholera morbus, accompanied with convulsions, which seemed to completely shatter his nervous system and left him in a wholly nervous state. On Monday following he was again better, proposed to go to his business, and asked his physician, on account of restlessness, to give him some opiate for a quiet night's sleep. The physician ordered a preparation of opium and directed him to take twenty drops of it before going to bed. He was at this time taking chloral, under the same medical advice, and the opium was directed to be taken in addition to a prescribed dose of chloral. That night the insured took the prescribed dose of chloral, and, as may be inferred from the facts shown, a dose of opium also. There is no direct evidence as to the quantity of opium he took, but I shall treat the case as if the evidence respecting the symptoms that followed and the actions of the insured was sufficient to warrant a jury in finding that, through inadvertence, the insured took more opium than he intended to take, and such a quantity that his death was caused thereby. It is by no means clear that such finding would be warranted by the evidence given, and it is certain that no conclusion more favorable to the plaintiff can be drawn

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from the proofs. I am, therefore, to determine whether, as matter of law, such a death is within the scope of the policy sued on. Upon this question, my opinion is adverse to the plaintiff. As I view the evidence, the death was caused by "medical treatment for disease," and, if so, it was excepted by the terms of the policy.

The contention in behalf of the plaintiff is, that the opium was not administered by the hand of a physician, and, moreover, was not the dose directed by the physician to be taken, but was a dose taken by the insured upon his own judgment, and that these facts take the case out of the exception in the policy. But, it must be conceded, that the opium which caused the death was taken by the insured with the object of allaying the nervous excitement from which he was suffering. Certainly, then, this was disease. The advice of a physician had been taken as to its cure. It is equally certain that there was a treatment of this disease, for, the remedy prescribed by the physician was taken, although in excessive quantity, and the opium taken was so taken because the physician had prescribed it to remedy the disease. The opium was taken with no other object than to effect the result which the physician had advised should be attained by using opium. Under these circumstances, the fact that the patient deviated from the direction given by the physician in the matter of amount, and, upon his own judgment, took a larger dose than had been directed, does not change the character of the act. The object of the insured in taking the opium he did was to cure or else to kill. The facts repel the idea of an intention to kill and prove the intention to cure. Death caused by such an act, done with such an intent, is, in my opinion, a death caused wholly or in part by medical treatment for disease and, therefore, is not covered by the policy. I am also of the opinion that the facts do not disclose a case of bodily injury, effected through "external, violent and accidental means," occasioning death, within the meaning of the policy. I do not consider that violence can fairly be said to be an ingredient in the act

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of taking a dose of medicine, although the medicine be destructive in its action and death the result.

These considerations compel to a denial of the motion for judgment in favor of the plaintiff, and a direction that judgment for the defendants be entered.

Redfield & Hill, for the plaintiff.

Mather & Ennever, for the defendants.

IN THE MATTER OF SOLOMON BEISENTHAL AND ANOTHER,
BANKRUPTS.

On the 19th of July, 1876, B. made, in New York, a valid voluntary assignment of all his property for the benefit of all his creditors, without preferences. The assignee accepted the trust and qualified. Afterwards a creditor recovered a judgment against B. in an adverse suit, on a debt existing before the assignment, and, under an execution thereon, the property covered by the assignment was levied on and taken possession of by the sheriff. Afterwards, and on the 11th of September, 1876, a petition in involuntary bankruptcy was filed against B. by creditors, other than the judgment creditor, and he was adjudged a bankrupt, and an assignee in bankruptcy was appointed. By agreement, the property was sold by the sheriff, and he held the proceeds subject to the order of the District Court in bankruptcy. That Court decided that the assignee in bankruptcy was entitled to such proceeds, to the exclusion of the execution creditor: *Held*, on review, that such decision was correct.

The assignment was void, under the bankruptcy statute, as against the assignee in bankruptcy.

Where an assignment is void as to creditors, by reason of its being made to hinder, delay or defraud them, it does not in law oppose an obstacle to the enforcement of their legal rights.

But, where such an assignment is valid as to the debtor and as to creditors, and is avoided by the assignee in bankruptcy, only as having been made in contravention of the bankruptcy statute, no right of any judgment and execution creditor, intervening between the time of such assignment and the time of the filing of the petition in bankruptcy, can prevail over the superior right of the assignee in bankruptcy to the proceeds of the assigned property.

(Before JOHNSON, J., Northern District of New York, February 24th, 1877.)

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JOHNSON, J. This is an application to review the decision of the District Court in bankruptcy. The material facts are, that, on the 19th of July, 1876, the now bankrupts made a voluntary assignment of all their property for the benefit of all their creditors, without preferences, and complied, in respect to it, with all the provisions of the statutes of New York regulating such assignments. The assignee accepted the trust and qualified as assignee. Afterwards, creditors recovered judgments against the assignors in adverse suits, upon debts existing before the assignments, and executions were issued thereon to the sheriff of the proper county, who levied upon all the goods and merchandise covered by the assignment, and took the same into his actual possession. Afterwards, and on the 11th of September, 1876, creditors of the assignors, other than the judgment creditors, filed their petition praying that the assignors might be adjudged bankrupts. On the 26th of September, 1876, an adjudication of bankruptcy was duly had, a warrant issued, and an assignee was afterwards duly appointed and qualified. Afterwards, upon the stipulation of the parties in interest, the property levied upon was sold by the sheriff, the proceeds to be held subject to the order of the District Court in bankruptcy. The questions involved were brought before the Court upon motion, and, after hearing the parties interested, it was decided that the assignment, not having been made with intent to hinder, delay or defraud creditors, contrary to the laws of New York, was valid as against the execution creditors, and that they took nothing by the levy made under the executions; but that the assignment, having been made within three months before the filing of the petition against the bankrupts, was void as against the assignee in bankruptcy, and that he, therefore, was entitled to the proceeds of the property, to the exclusion of the execution creditors' claim of priority, and it was ordered accordingly.

That such an assignment is void against the assignee in bankruptcy has been long held in the Courts of the United States, in most of the Circuits. It has been recently elaborately re-examined by Judge Emmons, in the Sixth Circuit,

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and his opinion is so full and able that it scarcely leaves any thing material to be added. (*Globe Ins. Co. v. Cleveland Ins. Co.*, 14 *Nat. Bkcy. Reg.*, 311.) All the judges in this Circuit have repeatedly so held. This view receives a strong affirmative support from the provisions of the Act of July 26th, 1874, (19 *U. S. Stat. at Large*, 102,) amending section 12 of the Act of June 22d, 1874, (18 *Id.*, 178,) in amendment of the bankrupt law. That amendment provides, that no voluntary assignment by a debtor of all his property, made in good faith, for the benefit of all his creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall, of itself, in the event of his being subsequently adjudicated bankrupt in involuntary bankruptcy, be a bar to the discharge of such debtor. When it is considered that the making of such an assignment had been frequently held to be of itself an act of bankruptcy and to bar a discharge, the implication is irresistible, from the very narrow limitation put by this amendment upon the law as understood and administered, that, in the judgment of Congress, the general interpretation of the law was correct. This amendment alters the law only in involuntary cases, and in them only in the single particular, that such an assignment, of itself, is no longer a bar to a discharge. In voluntary cases it is a bar, and in all cases it is an act of bankruptcy, and is void as against the assignee, according to the intent of Congress as plainly implied from this enactment.

The general intent of the bankrupt law was not only to administer assets on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be entrusted with their administration, and to add the sanctions of the criminal laws of the United States to secure the results aimed at. To permit the administration of the assets of an insolvent and bankrupt debtor to be committed to a trustee of his choice, and thus to reduce the bankrupt law to a mere process for discharging a debtor from his debts, is quite inconsistent with any fair view of the purpose of this legislation.

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Thus far the Courts of the United States are in substantial agreement. Nor, so far as I am informed, is there any disagreement in regard to the next proposition. Where an assignment is void as to creditors, by reason of its being made to hinder, delay or defraud them, it does not in law oppose an obstacle to the enforcement of their legal rights. A creditor who has obtained an execution may treat such an assignment as void, and levy upon the property transferred by it. The bankrupt law does not interfere with this right, if exercised prior to the application in bankruptcy for an adjudication, and if the judgment and execution were obtained without collusion on the part of the debtor, in violation of sections 5021 and 5128 of the Revised Statutes. In the case supposed, the assignment, being fraudulent as against creditors and void, does not so transfer the property to the assignee as to obstruct their rights, although good as against the debtor himself. Their judgments are liens upon the assigned real estate, and their executions bind the personal property just as if no assignment had been made. These rights of creditors do not grow out of the bankrupt law, and in no sense depend upon it for their origin or support. The bankrupt law, under certain circumstances, defeats these rights, but never confers them.

We now come to a different case, in respect to which differences of opinion exist among the judges of the District Courts, and upon the decision of which this cause depends. Here, the assignment was not made to hinder, delay or defraud creditors, and all the requirements of the laws and statutes of the State of New York had been complied with in respect to it. The title to the assigned property passed, by the assignment, to the assignee. No creditor, as such, could successfully assail it. No judgment or execution, obtained against the debtor after the assignment, could bind the property, for the plain reason that the title of the debtor was gone from him by a transfer valid against him and valid against creditors. But, under the provisions of the bankrupt Acts, (*R. S.*, § 5129, and *Act of June 22d*, 1874, § 10,) a right was conferred upon an assignee in bankruptcy of such an assignor, to avoid such an

assignment, provided it was made within six months before the filing of the petition for an adjudication of bankruptcy in a voluntary case, or within three months in an involuntary case, and provided, also, that the other requisites pointed out by the statute existed. The right thus given was to recover the property, or the value of it, as assets of the bankrupt. The title of the assignee in general relates back only to the commencement of the proceedings in bankruptcy, but, in the particular cases of transfers made void as to him, his title relates back to the time of such transfers. The substantial question is, whether, under these provisions of the law, creditors by judgment and execution obtained after the assignment, having, by reason of it, no lien upon or right in the assigned property, are to be let in to intercept, and take precedence of, the right of an assignee in bankruptcy to the property or its value, when he exercises his right to avoid the assignment and to recover the property. Upon this question the opinion and decision of Judge Wallace against the claim of the judgment creditor is given in *Johnson v. Rogers*, (15 *Nat. Bkcy. Reg.*, 1.) In *Macdonald v. Moore*, (8 *Benedict*, 579,) Judge Blatchford reaches a different conclusion, and each of these learned judges has stated the arguments and considerations which led him to his conclusion. Between these conflicting views the controlling and decisive consideration seems to me to be that which Mr. Justice Story puts forward as the ground of his judgment upon a similar question under the bankrupt Act of 1841, in the case of *Everett v. Stone*, (3 *Story*, 446, 454, 455.) He says, in substance, that the judgment creditors cannot avail themselves of a fraud under the bankrupt Act, to defeat the very policy of the Act itself. That policy is, equal distribution among creditors, through the agencies of the bankrupt law. To avoid the assignment as in conflict with that policy, and, as a consequence, to allow particular creditors to intercept the fruits of avoiding it, and thus prevent equal distribution, would be contradictory, and would subvert the whole laudable purpose of the bankrupt Act, so far as creditors are concerned. These considerations were overlooked in *McLean v. Melino*,

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(3 *McLean*, 199,) where it was assumed, rather than adjudged, that, if an assignment could be avoided under the bankrupt Act, the necessary consequence was that judgment creditors would be let in to claim according to their priorities, in preference over the assignee in bankruptcy.

The acts of the assignee in bankruptcy do not enure to increase the rights of the judgment and execution creditors. (*Dodge v. Sheldon*, 6 *Hill*, 9 ; *Seaman v. Stoughton*, 3 *Barb. Ch. R.*, 344.) When the assignee recovers the property, he takes it as the debtor had it at the time of the act which the assignee avoids, so far as creditors of the debtor are concerned. Avoiding the transfer in favor of the assignee in bankruptcy does not revest the property in the debtor, but vests it directly in the assignee, who takes it by virtue of the statute. The transfer by the debtor, good against him, and good against his creditors, prevents any lien by subsequent judgment or execution. Upon the property so situated the statutory transfer to the assignee in bankruptcy operates directly, and cannot be subjected to the liens of intervening judgments and executions without overthrowing both the language and the policy of the bankrupt Act in its most vital provisions.

I am, therefore, of opinion that the order of the District Court under review was correct, and should be affirmed.

Norris Morey, for the assignee in bankruptcy.

Sherman S. Rogers and *E. Carlton Sprague*, for the judgment creditors.

Schillinger v. Gunther.

JOHN J. SCHILLINGER

vs.

HERMANN A. GUNTHER. IN EQUITY.

The invention set forth in reissued letters patent granted to John J. Schillinger, May 2d, 1871, for an improved concrete pavement, defined, and the claim construed.

The claim is not confined to the making of joints by the permanent interposition of some material between the blocks, but it embraces the making of joints by the temporary interposition of a cutting material while the pavement is in process of formation, inasmuch as the latter method accomplishes the substantial results of the patentee's invention, in substantially the same way in which they are attained by the patentee.

Circumstances stated which govern the amount of the fine to be imposed for a contempt of Court by violating an injunction issued restraining the infringement of a patent.

(Before SHIPMAN, J., Southern District of New York, February 26th, 1877.)

SHIPMAN, J. This is a motion for an attachment for contempt of Court by reason of the alleged violation of an injunction order. Reissued letters patent, dated May 2d, 1871, were issued to the plaintiff for an improved concrete pavement. The specification, including the portions subsequently disclaimed, and which are enclosed in brackets, states that the invention "relates to a concrete pavement, which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining section. With the joints of this sectional concrete pavement are combined strips of tar paper or equivalent material, arranged between the several blocks or sections in such a manner as to produce a suitable tight joint, and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto." After describing the composition of the concrete, the specification continues: "While the mass is plastic, I lay or spread the same on the foundation or bed of the pavement, either in moulds

or between movable joists of the proper thickness, so as to form the edges of the concrete blocks, *a a*, one block being formed after the other. When the first block has set, I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set; [and, since the concrete, in setting, shrinks, the second block, when set, does not adhere to the first, and so on;] and, when the pavement is completed, each block can be taken up independent of the adjoining blocks. Between the joints of the adjacent blocks are placed strips, *b*, of tar paper, or other suitable material, in the following manner: After completing one block, *a*, I place the tar paper, *b*, along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar paper joint, and proceed with the formation of the new block until it is completed. In this manner, I proceed until the pavement is completed, interposing tar paper between the several joints, as described. The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks. * * * * * [In such cases, however, where cheapness is an object, the tar paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid, each independent of the adjoining blocks."] The claims are: "1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described; 2. The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, essentially as, and for the purpose, set forth." On February 2d, 1875, the plaintiff disclaimed the portions included in brackets, and, in his disclaimer, also said: "Your petitioner hereby disclaims the forming of blocks from plastic material without interposing

anything between the joints, while in the process of formation."

In April 1875, the bill in equity of the plaintiff against the defendant, alleging an infringement of said letters patent, and praying for an injunction and an account, was heard upon the pleadings and proofs by this Court. It was clearly proved that the defendant had made and laid the pavement described in the patent, except that he had substituted tin foil between the joints in lieu of tar paper. An attempt was made to show that the invention had been anticipated by other manufacturers of concrete pavement in this country, which attempt was unsuccessful. The American patent of Horace P. Russ, dated March 14th, 1848, and the English patent of John Little, dated April 29th, 1864, were also relied upon by the defendant, as anticipatory of the plaintiff's invention. Mr. Russ's invention consisted of a foundation pavement of concrete, which was afterwards to be covered with ordinary stone flagging. This sub-pavement of concrete was divided, in places where it covered a sewer or a drain, into panels, by bars of iron forming crosses, united by an eye-bolt, with a ring in the head of each bolt. When repairs were to be made upon the sewer the panel could be lifted, without injury to the rest of the concrete, by suitable appliances attached to the ring. The Little patent was for a metallic frame work, filled in with concrete blocks. Neither device had substantial similarity to the pavement of the plaintiff. As the novelty of the plaintiff's invention was not disproved, and as the infringement was manifest, a decree was rendered directing an injunction and an accounting before a master.

The plaintiff has now filed a motion for attachment, claiming that the defendant is violating the injunction and the patent, by the construction of the pavement which is hereafter described. As the parties were at issue upon the manner in which the pavement was constructed, a reference was directed to a master to find the facts, who has reported as follows: "The ground was prepared by grading to four inches below the final and completed surface of such pavement. Upon the

surface of the ground so graded were placed wooden frames or mould boards, four inches in height or thickness. In such frames or mould-boards were first formed the one-half of the proposed diamond-shaped blocks. The said frames were then removed back, so that their points of separation rested against and accorded with the points of the half blocks of pavement already laid, thus making, by means of the sides of the two completed half blocks and the two sides of the frames or mould-boards, the shape for the diamond-shaped block to be made by the next operation. The materials used and the manner of using them were as follows: A lower course upon the ground as graded was laid, composed of one part of cement, three parts of sand and two parts of gravel or broken stone, (none of the particles of such gravel or broken stone exceeding two inches in diameter.) This lower course was laid to the depth of three inches and tamped down. Before the second block is thus laid in its lower course, the lower course of the first block is allowed to become "well set." After the lower layer has been thus laid to within one inch of the final surface, the upper layer is then put on, which upper layer consists of one part of cement and one part of fine sand, such upper layer being put upon the first-formed block first and shortly after such first block has been made with the bottom layer thereon. The top layer of cement and sand was then placed upon the bottom layer of the second block, up to and against the top layer of the first block, and the laying of the pavement was thus continued. After the laying of two adjoining blocks, and while the upper material for the second block was in a soft or plastic state, a trowel or other similar instrument was inserted between the top layers of the first and second block through the upper layer, for the purpose of making a separation or joint between them, thus making what is commonly known and designated as a block pavement." It is conceded that this description of the method in which the pavement is made is correct.

The question at issue between the parties is, whether a pavement constructed in the manner described is an infringe-

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ment of the patent. That the defendant's pavement is constructed of separate layers of coarse and fine cement, I do not regard as material. The upper layer is divided into blocks by the insertion of a trowel after the separate sections have been made in the frame, and while the concrete of the second block is still plastic. The defendant thus makes a block pavement, which can be taken up, so far as the blocks into which the top layer is divided are concerned, without injury to the adjoining blocks. The pavement possesses the advantage of the plaintiff's invention. The plaintiff forms his joint by the permanent interposition of some material between the blocks, which material also serves, in some degree, to make a tight joint. The defendant forms a joint by the insertion of a cutting instrument between the blocks, and then removing the instrument, leaving the joint an open one for the time. The question between the parties becomes one of construction of the patent. Is the patent confined to the making of the joints by the permanent interposition of some material between the blocks, or does it embrace the making of the joints by the temporary interposition of a cutting material while the pavement is in process of formation? For the purpose of determining this question, it is necessary to ascertain the actual invention of the patentee.

It was manifest, upon the former hearing of this case, that the old method of laying cement or concrete pavement was in sections between joists or frames, without any attempt to divide the pavement into blocks. The pavement was a uniform surface of concrete, subject to contraction and expansion from natural causes, and, when it became cracked through the agency of frost, was not easily repaired. The improvement and the invention consisted in dividing the pavement into blocks, so that one block might be removed and repaired without injury to the rest of the pavement. Although this improvement, however effected, whether by the insertion of a trowel, or by the permanent interposition of some other means of separation between the blocks, now appears to have been a simple invention, yet it was one which the history of

the art shows to have been previously unknown, and to have been of practical importance, and to have been received with much favor by the public. The plaintiff supposed that his invention included a block pavement in which the blocks were formed either with or without the interposition of something between the joints. He subsequently ascertained that he was mistaken, and that the pavement was not divided into blocks without the interposition of some material to form joints. The discovery of this fact led to his disclaimer, wherein he disclaimed the forming of blocks from plastic material without interposing anything between the joints. This disclaimer left the patent for a pavement, wherein the blocks were formed by the interposition of some separating material between the joints, and, in the specification, he has described tar paper, or its equivalent.

A strict construction of the patent would limit the patented invention to the permanent interposition of the equivalent material, but such a construction would be a limitation of the actual invention. The method adopted by the defendant accomplishes the substantial results of the plaintiff's invention, in substantially the same way in which they are attained by the plaintiff. The difference in method is, that the material is not permanently interposed between the blocks, and this leads to the only difference in result, which is, that the defendant's method leaves an open joint, instead of the tight joint of the plaintiff, which is not the material part of the plaintiff's invention. The material part was to make a cement pavement separated into blocks by joints. This was the end to be accomplished by each party. Inasmuch, then, as the plaintiff's actual invention is substantially reproduced by the defendant and there is substantial identity in the means by which the material portion of the result was accomplished, I am of opinion that the mode of operation which the defendant has adopted, is within the proper limits of the patent, and is included within the first claim.

The well known and just principle of the Courts of this country is, that a liberal construction is to be given to the

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language of all patents and specifications, *ut res magis valeat quam pereat*. In pursuance of that rule, "the technical claims in a patent are to be construed with reference to the state of the art, so as to limit the patentee to, and give him the full benefit of, the invention he has made." (*Estabrook v. Dunbar*, 10 *Pat. Off. Gazette*, 909.)

It was well understood by both parties, upon the argument, that the object of the motion was not to mulct the defendant in damages, but to obtain a decision in regard to the extent to which the plaintiff was to be protected in the enjoyment of his patent, which had been decided to be valid and to have been infringed. I am of opinion, from all the circumstances which are disclosed in the affidavits and the testimony before the master, that there has been a studied attempt on the part of the defendant to obtain the benefit of the plaintiff's invention. But I am not disposed to impose a severe fine, in view of the fact which has been stated. The motion is granted, and a nominal fine of fifty dollars, in addition to a sum equal to the fees of the master upon this reference, is imposed upon the defendant, to be paid to the plaintiff as partial indemnity for his expenses.

Edward Fitch and John Van Santvoord, for the plaintiff.

Arthur V. Briesen, for the defendant.

The Mayor, &c. of New York v. The New England Transfer Co.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK

vs.

THE NEW ENGLAND TRANSFER COMPANY. IN EQUITY.

By the 15th section of the Montgomerie charter, granted to the city of New York in 1780, there was granted to the corporation of that city the sole power of establishing such ferries "around Manhattan's Island," "for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan to Nassau Island, and from thence back to Manhattan's, and also from the said Island, Manhattan's, to any of the opposite shores all around the same Island," in such and so many places as the Common Council should think fit, and the ferriages from such ferries were also granted to the corporation. The boundaries of the city were made co-extensive with Manhattan Island. In 1874, part of another county was annexed by the Legislature of New York to the city of New York, and declared to be a part of the city as if it had always been so, and the like powers were given to the corporation, over the annexed territory, as if it had always been a part of the city. Afterwards, a ferryboat, fitted up to transport railroad cars only, was run to and fro between a place in such annexed territory and a place in New Jersey opposite the city of New York, connecting with railroads running from the termini of the ferry. The boat was provided with two railroad tracks, which prevented the entrance of ordinary vehicles and of foot passengers, except as transported in the cars: *Held*, that such ferry was not such a ferry as the charter contemplated, and did not invade the exclusive franchise of the corporation.

Whether the Legislature can interfere with the ferry franchise granted by said charter, *quere*.

Whether the franchise so granted is limited to establishing ferries from the original territory of the city, *quere*.

(Before SHIPMAN, J., Southern District of New York, March 10th, 1877.)

SHIPMAN, J. This is a bill in equity, which is brought by the corporation of the city of New York, to restrain the defendants from operating a ferry, without the license of the plaintiffs, from Mott Haven, on the north shore of the Harlem River, within the 23d Ward of the city of New York, to

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Jersey City. The following agreed statement of facts specifies the character and uses of the boat which is employed by the defendants, the route over which the boat passes, and the object for which the said boat and route are used: "The defendants are a corporation, organized under the laws of the State of Connecticut. A certified copy of their charter may be read in evidence. They hold a contract with the United States for the carriage of certain mails. They are owners of a side-wheel steamboat, called the Maryland, of about 1,093 tons burthen, enrolled and licensed for the coasting trade, under the laws of the United States. The said steamboat is constructed as what is popularly called a 'double ender,' *i. e.*, with open ends for entrance upon and egress from the main deck fore and aft, and capable of being run either end foremost, having at each end a rudder controlled from the rudder wheel in the pilot house on the upper deck, but she is not adapted to or capable of the transportation of ordinary vehicles or traffic, and her sole purpose and adaptation is to the transfer of railroad cars. On the main deck two railroad tracks are laid down, occupying the entire space on the main deck to the bulkheads on the sides of the vessel, extending from end to end of the boat, and preventing the entrance or egress of vehicles, and also of passengers, baggage or freight, except as the same may be transported in railroad cars run over the said railroad tracks, which are so adjusted as to connect with corresponding tracks on the platform or bridge at the railroad dock, or of the railroad landing place to which the boat runs. Cars containing passengers and their baggage, other freight and mails, are run upon the boat at the place of embarkation, on the arrival of trains at the terminus of the railroad at such place of embarkation, and are run off from the boat at the place of disembarkation, for further transportation by land; but no passengers, baggage, freight, goods or merchandise are taken or transported on said steamboat, except as the same may be contained in railroad cars run on and off said tracks as aforesaid. Used in this manner, the Maryland has been employed by the defendants since the 10th day of May, 1876, for the

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transfer of drawing room, sleeping and ordinary passenger cars containing passengers and baggage, freight, express and mail cars containing baggage, freight, express matter and mails, from a point at a place called Mott Haven, on the north shore of the Harlem river, now within the Twenty-third Ward of the city of New York, but formerly the town of Morrisania, in the county of Westchester and State of New York, to a point in Jersey City in the State of New Jersey, at the dock of the Pennsylvania Railroad Company, and *vice versa*. The trips of the Maryland are dependent upon the arrival of trains connecting by railroad from places north and east of the city of New York, and arriving at Mott Haven, bound south and southwest, and upon the arrival of connecting trains by railroad from places south and southwest of Jersey City, arriving at that city and bound north and northeast, with no other delay of the journey than such as is necessary to run the cars on and off the boat. The drop platform or bridge at Mott Haven, by means of which the cars of the defendants are run upon and off from the deck of the Maryland, is so constructed and operated as to rise and fall with the tide in the Harlem river; but it does not project into the river beyond the natural line of low-water mark, sufficient artificial excavation having been made to give ample depth of water to float at any tide. The course of the Maryland on leaving the dock at Mott Haven is down the Harlem river to its junction with the East river, down the East river southward to the bay of New York, through the said bay around the Battery to the Hudson or North river, and up the Hudson river to the dock at Jersey City in the State of New Jersey, on the west shore of the Hudson river, and crossing the dividing line between the States of New York and New Jersey in the course of the trip. On the trip of the boat from Jersey City to the place of landing at Mott Haven, the course (being reversed) is over the same water. No fixed or separate toll is charged or taken by the defendants in respect to the carriage of passengers' baggage or freight upon the said steamboat, but the defendants operate their said route as a part of a continuous line for the

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transportation to the place of destination, of passengers, baggage, freight, mails, and other property, on their way from places north and east of the city of New York, in the States of Massachusetts, Connecticut and New York, to places respectively south and southwest of the said city of New York, in the States of New Jersey and Pennsylvania, respectively, and *vice versa*, under arrangements made by the defendants with the New York & New England Railroad Company, the Hartford, Providence & Fishkill Railroad Company, the New York, New Haven & Hartford Railroad Company, the Pennsylvania Railroad Company, and the other railroad companies whose roads form a part of said continuous lines, and which are incorporated and exist under the laws of the States of Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania, and, as part of such continuous line between Mott Haven and Jersey City, the defendants transport such passengers, baggage and freight by water, in the manner above mentioned. Neither of the railroad companies above mentioned had separately or jointly, prior to the 10th day of May, 1876, established or effected a transportation of passengers, baggage, freight or mails, by or by means of what is herein described as the continuous route between Mott Haven and Jersey City. Through coupon tickets, in the usual form, are sold to the passengers. The compensation of the defendants for the carriage by water between Mott Haven and Jersey City, is included in a through rate, and collected by the railroad companies selling a through ticket to a passenger or delivering freight to a consignee, and is paid over to the defendants. The compensation of the defendants in respect to the carriage of United States mails upon the said continuous line and route, by their said steamboat, is paid to said defendants by the postmaster-general, in the manner established by law, and is fixed by and included in a contract made between the defendants and the Post Office Department of the United States, for the transportation of such mails over their portion of said continuous line, from places north and east of the city of New York to places south and southwest of the

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said city of New York, and *vice versa*. The Pennsylvania Railroad Company own and control the dock and slip at Jersey City, and the New York, New Haven & Hartford Railroad Company own and control the dock and slip at Mott Haven, and purchased the same prior to the passage of Chapter 613 of the Laws of New York, 1873, up to which time the place called Mott Haven was, as it had ever prior thereto been, a part of Westchester county. Neither the Mayor, Aldermen and Commonalty of the city of New York, nor the Common Council of said city, have ever taken any action to establish any ferry between the termini of the route navigated by the said steamer Maryland, nor over any other route or line with which said Maryland competes or interferes. The maps identified by the signatures of the counsel for the respective parties, and made under the direction of Mr. G. W. Greene, Jr., engineer-in-chief of the Department of Docks, are admitted to be correct, and may be referred to at the hearing by either party. All charters, grants and legislative acts of the State of New York, of the United States, or of any State of the United States, material to this cause, may be referred to, on the hearing thereof, by either party."

The Montgomerie charter, granted in 1730, (4 Geo. II.) "is the charter upon the foundation of which the city of New York is at present governed." (*Kent's Charters*, note xix, p. 212.) It recited and ratified the Dongan charter, which was the first English charter granted to the city of New York, in 1686, and the Cornbury charter, granted in the 7th of Queen Anne, and conferred new and additional powers upon the corporation. By the 15th section of the Montgomerie charter, the Crown of England granted and confirmed to the mayor, aldermen and commonalty of the city of New York, and their successors, forever, "the sole, full and whole power and authority of settling, appointing, establishing, ordering and directing * * * * such and so many ferries around Manhattan's Island, *alias* New York Island, for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan to Nassau Island, and from thence back to Manhat-

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tan's, and also from the said Island Manhattan's to any of the opposite shores all around the same island, in such and so many places as the said common council" shall think fit. The rents, issues, profits, ferriages, fees and other advantages arising from such ferries were also granted to the said corporation. By the 37th section, there was also a grant of the existing ferries, "and all other ferries now and hereafter to be erected and established all round the island of Manhattan's." The boundaries of the city were made co-extensive with Manhattan Island.

By an Act of the Legislature of the State of New York, passed May 6th, 1874, (*Chapter 329 of the Laws of 1874*), the towns of Morrisania, West Farms and King's Bridge, all of Westchester county, were annexed to the city of New York, and were constituted the 23d and 24th wards of that city. The first section of this Act declared that this territory was thereafter to be a part of the city, and to be entitled to the immunities, privileges and franchises of the city, in every respect, and to the same extent, as if the annexed territory had always been included within the city. The eleventh section provided that the mayor and common council of the city of New York should thereafter exercise over the annexed territory the same powers, in like manner and to the same extent, as if said territory had always been a part of the city of New York, except as limited or excepted by the Act itself.

Upon the foregoing facts, three questions of law arise: 1st. Did the city of New York obtain, by the Montgomerie charter, exclusive power to establish all the ferries from the original limits of the city to any of the opposite shores? 2d. Was this exclusive franchise extended to and impressed upon the annexed territory, so that a ferry could not be established from a point within the 23d ward, without the license of the common council, or is the franchise limited to the establishment of ferries from Manhattan Island? 3d. Is the user, by the defendants, of the Maryland upon its route, a ferry, within the true meaning of the Montgomerie charter?

1. The grant was of an exclusive right in the corporation

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to establish future ferries from any part of the original territory of the city, to any of the opposite shores, and to receive, for the exclusive benefit of the corporation, the ferriages arising therefrom, or the emoluments arising from any ferry licenses which the common council might give. Whether the legislature of New York can or cannot interfere with this exclusive grant, and divest the city of the rights which it acquired by such charter, is a question which has not yet arisen. The grant seems to have been one of property as well as of public or political power; and, whenever the question shall arise in regard to the control of the State, acting by its legislature, over the grant, the remarks of Chancellor Kent, in his notes to the charters of New York, (*Note xxx, page 235,*) in opposition to the theory that the grant is within the reach of gratuitous legislative resumption, will undoubtedly receive the consideration which has always been given to the opinions of that eminent judge. (*Benson v. Mayor, &c.*, 10 *Barb. S. C. R.*, 223; *Darlington v. Mayor, &c.*, 31 *N. Y.* 164, 203; *People v. Mayor, &c.*, 32 *Barb. S. C. R.*, 102; *Mayor, &c. v. Staten Island Ferry Company*, 8 *Jones & Spencer*, 232.)

2. The second question is, whether the exclusive franchise is or is not limited to the establishment of ferries from Manhattan Island, the original territory of the city. The grant, which has been heretofore substantially recited, was a grant of an exclusive right to establish ferries around Manhattan Island, from said island to any of the opposite shores. On the one hand, it is urged, that municipal jurisdiction extended throughout the whole island, and that, whenever, in either of the three charters, Manhattan Island was referred to, it was referred to for the purpose of designating the territory made subject to the corporate franchises and powers of the city, and was referred to as the territorial limit to which the ferry franchises could then extend, because the island and city territory were then identical, and that the meaning of the charter is, that, wherever the jurisdiction of the corporation extended, namely, throughout the island, that territory was affected with a corpo-

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rate and exclusive right in the corporation to establish all needful ferries, and that the powers which the mayor and common council rightfully exercised over the old territory, were, by the act of annexation, to be exercised over the new territory, to the same extent as if such territory had always been a part of the city, and that thus the ferry franchises were extended to and impressed upon such new territory. On the other hand, it may be urged, that the charter was of a municipal corporation, which was established upon an island; that the prosperity, and the very existence of the city depended upon its abundant, permanent and regular means of intercourse with the main land; that there was a necessity that the city should be furnished with the exclusive power to authorize the permanent establishment of regular and frequent means of communication with the opposite shores and with Long Island; that, therefore, the power was given to the corporation to connect the island by ferries with other places, as a power indispensable to the welfare of the city; that this power, being in terms for the establishment of ferries around the island, was not, by the act of annexation, extended to a power to establish ferries from the newly acquired territory beyond the island, but the construction of the grant should be governed and controlled by the circumstances which existed when the charter was given, and which made such a grant necessary; and that, therefore, the city of New York, as enlarged by the annexation, possesses only the same franchise which it previously had—that of establishing ferries from the *island*, and not necessarily from the territory of the city, and that this construction limits the grant to the natural meaning of the words employed. The view which I take of the third question, renders it unnecessary to express an opinion upon this point.

3. Is the liberty or privilege, which the defendants now use, of running the steamer Maryland, in the manner and for the uses described in the statement of facts, a ferry, within the meaning of the grant in the Montgomerie charter? In *Bridge Proprietors v. Hoboken Company*, (1 Wall., 116,) the Supreme Court held, that a railroad bridge, which was an

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extension of the iron rails which composed the material part of a railroad over the Hackensack river, together with such substructure as is necessary to keep the rails in place and enable them to support the cars, was not a bridge, within the meaning of an Act of the Legislature of New Jersey, passed in 1790, by which that State empowered certain commissioners to contract for the building of a bridge over the Hackensack, and provided that it should not be lawful for any person to erect any other bridge across the said river for ninety-nine years. The decision was upon the ground, that a railroad bridge, on which there was "no planked bottom, no roadway or path, nothing on which man or beast or vehicle could pass, save as it is carried over in the cars," was not a bridge, within the minds of the framers of the Act of 1790, or within the true intent and meaning of the exclusive grant contained in that Act. To the same effect are *Mohawk Bridge Co. v. Utica R. R. Co.*, (6 *Paige*, 554;) *McRee v. Railroad Co.*, (2 *Jones, Law*, 186;) *Thompson v. N. Y. & Harlem R. R. Co.*, (3 *Sand. Ch. R.*, 625.) The decision in *Enfield Bridge Co. v. Hartford & N. H. R. R. Co.*, (17 *Conn.*, 40.) where the contrary doctrine was ably maintained, is not in accordance with the prevailing opinion which is now entertained by the Courts of this country.

The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks

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is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals and freight, at intervals more or less regular, for fare or toll. The ordinary ferry is a substitute for the ordinary bridge, and is a means of transportation of all persons and ordinary vehicles, and is for the accommodation of the public generally, and should, therefore, be accessible to the public. The railroad ferry is a substitute for a railroad bridge, and is a part of a railroad route for the transportation of the cars which are used upon a railroad track, and the burden which they bear, and is not for the accommodation of any persons except those who happen to be, for the time being, railroad passengers. A railroad ferry is a means of connecting railroad tracks, or two railroads, as a railroad bridge is the continuation of railroad tracks across a stream of water. It differs widely, except in name, from a general or unlimited ferry, (*Fitch v. R. R. Co.*, 30 Conn., 38,) and is not within the spirit of the grant which was made to the city of New York in the year 1730; and the adoption of the word ferry, "to express the modern invention, does not bring it within the terms of the" charter, "if it is not within the intent of it." (*Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116.)

But, it is urged, that, in *Aiken v. Western R. R. Co.*, (20 N. Y., 370,) a ferry which was used by a railroad for the transportation of its passengers and freight, has been held to interfere with a ferry franchise theretofore granted. The ferry which the Western Railroad Company used at Albany was not the ferry which is described in the agreed statement of facts, and which is now known as a railroad ferry, and designed for the transportation of cars, although it was used by a railroad corporation, but was an ordinary steamboat and transported other persons, teams and carriages than such as

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were borne upon the railroad. It was justly held, that the maintaining by a railroad company of a ferry, upon which it regularly and constantly transported gratuitously persons not passengers nor in its service, was an invasion of the right of a proprietor of a ferry franchise. The decision in this case does not conflict with the doctrine which is recognized in *Fitch v. Rail Road Co.*, (30 Conn., 38.)

It results, that the establishment of the railroad ferry of the defendants is not an invasion of the exclusive franchise of the plaintiffs, assuming that their franchise was extended to the territory which was annexed in 1874.

Let there be a decree dismissing the bill.

George Ticknor Curtis, for the plaintiffs.

Simeon E. Baldwin and *George H. Forster*, for the defendants.

THE MILLER'S FALLS COMPANY

vs.

W. A. Ives & Co. In Equity. Two suits.

The invention set forth in reissued letters patent granted to the Miller's Falls Manufacturing Company, November 29th, 1870, for an improvement in instruments for operating tools, such as augers, bits, &c., the shanks of which are of variable sizes (the original patent having been granted to James M. Horton, July 8th, 1862,) defined.

The invention set forth in letters-patent granted to Charles H. Amidon, January 14th, 1868, for an improvement in bit-stocks, defined.

The claims of the patents construed, and the patents held to be valid.

The construction of devices which infringe the patents, set forth.

(Before SHIPMAN, J., Connecticut, March 23d, 1877.)

SHIPMAN, J. These are two bills in equity, each of which is brought to restrain the defendant corporation from an al-

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leged infringement of letters patent granted to James M. Horton, on July 8th, 1862, and reissued for the second time to the Miller's Falls Manufacturing Company, on November 29th, 1870, and also from an infringement of letters patent granted to Charles H. Amidon, on the 14th of January, 1868. Each patent is now owned by the plaintiffs. The Horton patent was for an improvement in instruments for operating tools, such as augers, bits, &c., the shanks of which are of variable sizes. The Amidon patent was for an improvement in bit-stocks. The infringement complained of in the first suit was the making and selling by the defendants of bit-braces, known in the market as the "Ives Brace" and the "Ives Novelty." The second suit was brought to restrain the defendants from making the "Centennial" and the "Centennial Novelty" braces, the manufacture of which last named tools was commenced after the first suit had been brought. The two bills of complaint may be treated as substantially one action. The principal defence as against the Horton patent is non-infringement, and as against the Amidon patent is want of novelty.

The Horton device was an auger handle, provided with a metal band, called in the patent a barrel, around its centre, the lower portion of which barrel is formed into a projecting cylinder or socket, recessed or slotted upon its opposite sides. The recesses receive two jaws, the ends of which are curved so as to lie loosely in the recesses, and act as hinges upon which the jaws swing. Along the centre axis of the cylinder there is a rectangular tapering bore, large enough to receive the shank of the boring tool. A revolving nut, which forces the jaws together, is fitted upon the screw threads which are cut upon the periphery of the cylindrical portion of the cylinder. When the nut is near the handle, the lower part of the jaws swing upon their hinged parts, so as to receive the shank of the tool to be used. When the nut is screwed up, the curved ends of the jaws enclose the shoulder of the auger shank. The claims are, "1. The combination of the barrel A, provided with a socket C, jaws B and D and nut N, working

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on a screw for holding a boring tool, substantially in the manner described and specified. 2. The socket C of the barrel A, having cavities *b b*, in combination with the jaws B D having curved ends to fit therein, to allow the necessary lateral movement in the socket without falling out, substantially as described and specified."

The Amidon brace consists, as described in the patent, "first, in the construction and use of two jaws, which conform to the taper of the bit shank, and are forced equally upon said shank at both ends, by a screw nut or other device; second, in the special construction of the end of the bit stock to hold said jaws and retain them always in place; third, in the formation of the groove in the edge of each jaw, so that the shoulders of the bit shank are enclosed, and the accidental withdrawal of the bit prevented;" and, fourth, in a particular not material to the present case. The bit stock has at one end the ordinary swivelled head, and at the other the clamping mechanism which is the subject of the invention. The end of the stock which receives the shank, and is called the foot, is cylindrical, and has a male screw thread cut upon its outer surface. A slot is cut vertically through the foot, and within this slot rest the jaws which seize and hold the shank. At the bottom of the slot is bored a cylindrical cavity with an enlarging orifice. A thimble or nut is constructed with a female screw thread corresponding at its lower portion with the thread on the foot, while the upper part is protuberant and contracted towards the mouth at the upper end. This nut screws upon the foot, and forces the jaws upon the shank. These jaws are in thickness suitable to fill loosely the slot. Their lower ends are attached to each other by a curved wire, which is rigidly set in one part, and projects loosely through the other part. The upper and lower ends of the jaws are bevelled, so that they may be forced together by the inclined surfaces of the nut and the cavity at the bottom of the slot, when the nut is screwed upon the foot. In the opposing surfaces of the jaws are formed grooves, which, when the jaws are in position, form a recess of square section. This recess is made tapering, so as

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to correspond with the taper of the bit shank, and is largest at the outer end, so that the shoulders of the bit shank may be enclosed within the jaws and the removal of the bit be prevented, except by relaxing the pressure of the jaws. As the jaws are loosely connected at the lower ends by the wire, they may either move apart, as on a pivot at that end, or they may be moved bodily away from each other, so as to accommodate a bit shank of any size or taper. The three claims which are material to this case are: "1. In combination with the jaws G, G, or their equivalents, constructed to move away from or towards each other in the manner described, so that they may conform to the taper of the bit-shank, the screw thimble F, or its equivalent, to force the said jaws upon said shank, as and for the purpose set forth. 2. The jaws G, G, constructed with the groove, formed substantially as set forth, so as to enclose the taper sides and the shoulders of the shank, as and for the purpose described. 3. The cavity D, formed with a bevelled orifice, as shown, in combination with the jaws G, G, constructed with correspondingly bevelled ends, as and for the purpose shown and described."

The Ives brace is substantially like the Amidon. The Novelty brace differs from the Ives mainly in the fact that, in the thimble, the threaded portion is separated from the swell portion, and the nose or head of the thimble is attached fixedly to the socket. The lower portion of the thimble revolves towards the foot, and, by its revolution, produces the same effect as if the whole thimble revolved.

1. As to the character of the Horton invention, and the construction of the Horton patent. Devices for holding tools or articles which have shanks of variable sizes and tapers were known prior to the date of the Horton patent, and consisted broadly of clamping jaws and a nut which caused the jaws to effect a gripe upon the tool to be held. Thus, the clamp described in the Mechanics' Magazine, vol. 14, page 116, consisted of two jaws, with a recess in them to hold whatever was placed therein. The jaws are forced together by a dome-headed nut acting upon their noses. The "Stever chuck"

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had a slotted socket with a screw thread, and two jaws, which clamp the tool by a screw nut or sleeve acting upon the jaws. The "Meriden Cutlery chuck" had a slotted socket, with a round tapering bore at the bottom of the chuck, and two jaws forced together by a collar or sleeve, which moves forward upon the socket without any screw-thread, and is retained in its place by friction. The D. H. Chamberlain awl holder, patented in 1854, which will be more particularly considered hereafter, has a socket, and a dome-headed nut moving upon the screw on the socket, which nut acts upon two jaws, which approach each other and grasp the shank of an awl or other similar instrument.

The peculiar features of the Horton handle consisted in combining with the handle or stock of a boring tool, a slotted cylinder, provided with a rectangular tapering bore for holding firmly the shank of a boring tool, and hinged jaws working in the slot, having the necessary lateral movement to receive, without displacement, variable sizes of tools, and a nut moving on the screw thread upon the circumference of the cylinder, which nut clamps the jaws together so as to hold the shank. The shank is held firmly in place by the tapering bore and by the jaws which seize the angular portion of the bit, and serve not only to draw out the auger from the wood, but also help to prevent the auger shank from being twisted in its place as the bit enters the wood. The nut wedges the swinging jaws against the edges of the shank of the tool, and binds the projecting noses of the jaws against the upper end of the shank, so as to hold the tool firmly in position as it advances in the wood, and so as to draw it back as it is endeavored to be pulled out. Neither of the pre-existing devices had this combination of barrel, slotted socket with threaded outer surface, tapering bore, hinged jaws and nut. It is not claimed by the learned expert of the defendants that the Horton invention was antedated by any of the devices placed in evidence. The patent was for a handle of a boring tool having these described elements in combination, which several elements are formed substantially as described in the specification. The

first claim was for the entire combination of the several elements. The second claim omitted the encircling nut, and made prominent the shape of the jaws by which lateral movement was permitted in the socket, without the jaws falling out.

2. The next question is whether the Ives and the Novelty braces infringe the Horton patent. These braces, which are substantially a reproduction of the Amidon brace, are manifestly an improvement upon the Horton invention, but have its leading features. These features, in the defendants' braces, are a threaded and slotted cylinder, which loosely holds a pair of movable jaws pivoted at the foot, or secured by a projection at the bottom of the slot, and enclosing a bit shank which they are made to clamp firmly by the action of an encircling nut, which is forced upon the shank at both ends, and closes the noses of the jaws over the top of the shank, so that the tool is held and retained in its proper position. The tapering bore of the Horton patent is transferred, in the defendants' braces, to the faces of the jaws, and becomes the tapering grooves which enclose the shank as the jaws are pressed against it by the action of the nut or thimble. The defendants insist that the jaws of the Ives braces and of the Horton patent are not the same, because they say that the only office of the Horton jaws is to prevent the auger bit from being withdrawn from the handle, and are a substitute for the nut or rivet which secures the handle of an old-fashioned auger, while the Ives jaws gripe the shank and prevent its turning around in the handle. But, the Horton jaws do not merely hold the auger bit in the handle. They also resist any tendency to turn around or to be twisted in the handle. Arguing upon this idea, that the office of the jaws in the two devices is different, the defendants easily prove that the respective jaws are radically different from each other, and that the grooved jaws of the Amidon bit holder, which grasp the shank so that it cannot turn, perform a different office from the jaws of the Horton handle, which, they say, serve merely to withdraw the auger bit; but, the premises being unsatisfactory, I am of opinion that the conclusion is also untenable. The principal

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of the Horton invention is reproduced in the Amidon and the defendants' bit stocks, and, while that principle is developed so as to make a more perfect instrument, it is developed in substantially the same way, and by the same general mechanical means. The lateral movement which is mentioned in the second claim of the Horton patent, is produced, in the Novelty brace, by the jaws being loosely pivoted together in the bottom or foot of the cylinder, instead of swinging in recesses or cavities of the cylinder, as in the Horton patent, and is produced, in the Ives brace, by the movement of the jaws in a projection substantially similar to the arrangement in the Horton cylinder. The hinge-like movement of the jaws is substantially alike in each brace.

3. Is the Amidon patent invalid for want of novelty? That the Ives and Novelty braces infringe the Amidon patent, is not practically denied, and the principal question which remains as to these two braces is the validity of the patent. The Amidon bit stock is an improvement upon the Horton handle, and it becomes important to ascertain wherein the improvements consist. They are found in the shape of the jaws, and of the nut or thimble, and in the cavity at the bottom of the socket. These jaws are bevelled at the upper and lower ends, so that they are forced together by the surfaces of the thimble and of the cavity at the foot of the cylinder. The grooves of the jaws are so tapered as to fit the edges and shoulders of the shank, and the protuberant portion of the sleeve gives the jaws such a capacity of movement that they can take in a bit shank beyond the end of its shoulder, and the jaws will conform to the shape of the shank. The bevel of the jaws at their upper and lower ends, whereby the jaws are forced together, and the taper of the grooves in the jaws, are the peculiar and distinguishing features of the jaws. The protuberant swell of the thimble, whereby the jaws have greater capacity of adjustment to the taper and shoulder of the bit shank, and the contracting mouth of the thimble, which draws the noses of the jaws together over the top of the shank, are the peculiar features of the thimble. The recess at the

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bottom of the slot, formed with a bevelled orifice, has its office to force the lower ends of the jaws together, as they are forced by the pressure of the thimble against the walls of the cavity. In the peculiar formation of these parts of the combination consist the patentable features of the Amidon patent.

The question of novelty depends materially upon the construction which is given to the patent and to its first claim, which is as follows: "In combination with the jaws G, G, or their *equivalents*, constructed to move away from or toward each other in the manner described, so that they may conform to the taper of the bit shank, the screw thimble F, or its *equivalent*, to force the said jaws upon said shank, as and for the purpose set forth." If this claim means the jaws G, G, or any jaws constructed so as to move away from or towards each other, in the general manner described, so that they may conform to the taper of a bit shank, in combination with the screw thimble F, or any thimble which forces the jaws upon the shank, the claimed invention was probably well known. Such a construction would limit the patentable part of the invention to the third claim, and would make it consist of the recess at the bottom of the slot in combination with bevelled jaws; but such a construction is not in accordance with the actual invention or with the specification. The peculiarities of the jaws G, G, are minutely described, and stress is laid upon the peculiar shape of the jaws, which evidently constituted, in the mind of the patentee, the distinctive feature of his invention. The protuberance and convergence of the screw thimble are described, though the same prominence is not given to the thimble as to the jaws. The first claim specifies the peculiarly shaped jaws G, G, or jaws which are substantially formed like the jaws G, G, in the following particulars, viz., which are constructed to loosely fill the slot, and so that they may move apart on a pivot, or may be moved bodily away from or towards each other in the described manner, and thus conform to the taper of different bit shanks, in combination with the peculiarly shaped screw thimble F, or a thimble which is so constructed as to allow, by its protuberance, the range of

movement of the jaws which thimble F permits, and also to bind the heels and noses of the jaws upon the shank. This claim has special reference to jaws pivoted and bevelled, which have the range of movement between the laterally supporting walls of a slotted cylinder which the jaws G, G, have, in combination with the encircling thimble, which, by its protuberant shape, also gives the jaws their capacity of movement, and, by its convergence, clamps the noses of the jaws. The grooves are particularly specified in the second claim, which is for the peculiarly shaped jaws G, G, with tapered and grooved faces. The third claim is for the cavity D, in the bottom of the slot, with a bevelled orifice, in combination with the jaws G, G, which combination permits a lateral movement of the jaws within the cylinder, and the closing of the heels of the jaws within the cylinder, and closing of the heels of the jaws when acted upon by the thimble.

This statement of the invention and this construction of the patent excludes from the consideration of anticipatory devices, the Stackpole brace of 1862, the Stackpole patent of 1867, the Goodell brace, and the Bartholomew brace of 1867. The jaws of neither of these braces have tapering ends or noses which are closed over the shoulders of the bit shank, and which are acted upon by a protuberant and convergent sleeve or thimble. These devices were not, however, mainly relied upon by the defendants, who chiefly urged, as an anticipatory invention, the Dexter H. Chamberlain awl holder, patented in 1854. This tool is a useful one for holding the shanks of awls, or other similar small tools, but could not be relied upon to endure the strain and twist which necessarily comes upon an auger or bit, whose radially cutting edges are forced by successive revolutions into the wood. The tool consists of a pair of clamps, each one of which is cylindrical upon the outside. The upper and lower ends are conical, which ends are cut off and do not run to a point. Through the centre of the inside of each one of the clamps, is cut a triangular groove from top to bottom, so that, when the clamps are placed together, the triangles face each other, and make a

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uniform, straight, square groove throughout the extent of the clamps or jaws. These jaws enclose the shank of an awl, and are screwed together and kept in place by a dome-shaped screw nut. These jaws are not like the Amidon jaws, loosely placed in a slotted socket, to give lateral motion, nor are they so constructed as to accommodate themselves to bit shanks of varying taper, nor is the dome-shape sleeve the equivalent of the protuberant and converging sleeve of the Amidon patent. In brief, the Chamberlain holder has neither the movable nor tapered jaws, nor the thimble, of the Amidon stock.

On February 16th, 1871, the plaintiffs, or their predecessors, licensed the defendants to make two thousand braces of their patent, No. 111,649, dated February 7th, 1871, for a royalty of ten per cent. on the net prices for which the defendants sold the braces. They did not manufacture the precise invention represented in their patent, but made a quantity of the braces known as the "Ives brace," and which are made according to the Amidon patent. I have not seen the Ives patent, and therefore do not understand precisely the difference between the two articles, but understand, from the testimony of the defendants' expert, that there is less capacity of lateral movement of the jaws at the foot of the brace in the Ives patent, than in the Amidon, and that the elder patent is broader than the Ives patent. The defendants were licensed only to make the article which was shown in their patent. On December 30th, 1875, the defendants, by agreement, submitted to a preliminary injunction against manufacturing the Ives brace, and conceded that it was an infringement of the Amidon patent, without conceding any other questions in the case, in regard to other braces. It was further agreed, that, in any accounting, the defendants shall account for all Ives braces, in accordance with the terms of said agreement of February 11th, 1871. Upon this state of facts, I think that the Ives brace is not protected by the license, and it is also true that the plaintiffs have agreed that the infringement is to be paid for as if it was so protected.

The questions in regard to the Centennial and Centennial

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Novelty braces only remain. These two braces differ from the Ives and the Novelty mainly in this, that the jaws are attached to the side walls of the bevelled cavity in the foot, and that these side walls move on a pivot towards each other, when operated upon by the screw thimble, and so pinch the jaws together. This accomplishes the same result, in substantially the same way in which it is accomplished in the Amidon patent, where the heels of the jaws are forced together in the bevelled orifice by the screw thimble acting directly upon the jaws, or, as it is expressed in the patent, the jaws are "forced together by the inclined surfaces of the thimble F and the cavity D, when the said thimble is screwed on the foot." It is not material whether the walls of the orifice pinch the jaws, or the jaws are pinched against the walls. These two braces, differing from the other braces of the defendants only in the particular which has been named, infringe also the third claim of the Amidon patent, and, equally with the other braces, infringe the first and second claims of that patent, and also of the Horton patent.

There should be a decree for an injunction against the four braces of the defendants, and for an accounting.

Charles E. Mitchell, for the plaintiffs.

Benjamin F. Thurston, for the defendants.

THE RUMFORD CHEMICAL WORKS

vs.

THOMAS C. VICE. IN EQUITY.

THE SAME vs. VARIOUS DEFENDANTS—56 SUITS.

Twenty days before the expiration of a patent for a self-raising flour, motions for injunctions, in over 50 suits, to restrain the infringement of the patent,

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were made. All of the suits but one were against grocers who were selling the flour. One was against a manufacturer. The patent had been sustained, on final hearing, in other suits, but had been much litigated, and until recently. Since then there had been no unnecessary delay: *Held*, that no laches could be imputed to the plaintiff.

Apprehension that the grocers may fear to sell non-infringing flours, and thus cause injury to the manufacturers of such flours, is no ground for withholding injunctions against the grocers.

That a person who has infringed by making the infringing flour has desisted, and has no intention of again making it, is no ground for not enjoining him.

(Before BENEDICT, J., Eastern District of New York, April 2d, 1877.)

BENEDICT, J. These actions come before the Court upon motions for preliminary injunctions. There are many actions, similar in character, brought by the same plaintiffs, who, as assignees of Eben Norton Horsford, are the owners of a patent for self-raising flour, made by the use of an acid phosphate of lime, and to be employed as a substitute for leaven or ferment in the making of bread. The defendants are, with one exception, grocers, who are charged with selling a self-raising flour such as is described in the plaintiffs' patent, to families where the same is used solely for the purpose of making bread. One of the defendants is a manufacturer of a self-raising flour. The plaintiffs' patent has been the subject of much litigation, which has resulted in its being sustained by the Courts, upon final hearings. The fourth claim of the patent has been sustained by the final decree of the Circuit Court of the United States for the Southern District of New York and the District of New Jersey. The third and fourth claims have been sustained by final decree in the District of South Carolina.

Upon this motion, it has not been contested that the prior adjudications upon the patent in other Courts afford a sufficient ground for asking a preliminary injunction in these actions, and the motion for an injunction has been opposed upon grounds outside of the question of the validity of the patent, and, first, upon the ground of laches, because the patent will expire on the 22d of the present month. To this objection the answer is, that the plaintiffs have been compelled to main-

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tain their rights in Court, and have but recently obtained an adjudication in their favor. Since that time there has been no unnecessary delay. Surely, the fact that infringers have been able to keep the patent in litigation until within a few days of its expiration furnishes no reason why the patentee should not enjoy his grant during the small remnant of the term.

The next ground of opposition is, that grocers are timid men, easily frightened, and, if an injunction be issued, directing these defendants, who are grocers, to abstain from selling such self-raising flour as is described in the plaintiffs' patent, they will be afraid to sell certain other kinds of self-raising flour not covered by the plaintiffs' patent, and not protected by the injunction here sought, whence great injury will follow to the trade of those who make and vend such other flours. This position can hardly be said to be taken by the grocers in whose names it is advanced, for, it is conceded that the defence here interposed has been assumed by the manufacturers of other self-raising flours. It is the injury to manufacturers of such other flours, and not to the defendants in these actions, that is put forward as a reason for withholding the injunction. Plainly, the suggestion that the injunction will work injury, in an indirect way, to third parties, affords no ground for denying the plaintiffs' application. Damage from loss of trade that may result to manufacturers of other self-raising flours not covered by the plaintiffs' patent, from groundless fears of other suits and injunctions in respect to other articles, that may come to possess the minds of timid grocers, is not to be charged to the plaintiffs, and affords no reason for withholding from the plaintiffs what they have been adjudged to be entitled to.

Again, it is said in behalf of the defendant who manufactures a self-raising flour, that he has now desisted from manufacturing any self-raising flour with phosphoric acid, and has no intention of making such a flour; and that an injunction against him is, therefore, useless. But, neither will an injunction hurt him, if it be true that he has desisted. Inasmuch as

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he concedes, that, up to a late day, he has been engaged in making such an article, he cannot complain if he be enjoined for the future. When, upon his own showing, there is no possibility of his being injured by the injunction asked for, and, upon that ground alone, the injunction may be granted in a case like this. As to the grocers, it is conceded they sell a self-raising flour to those who use it for the sole purpose of making bread, in violation of the fourth claim of this patent, which claim has been sustained in all the Courts that have been called to consider this patent. The plaintiff may, therefore, well ask to have them restrained. (See *Wallace v. Holmes*, 9 *Blatchf. C. C. R.*, 65.) The motion must, therefore, be granted.

Blatchford, Seward, Griswold & Da Costa, for the plaintiffs.

Francis Forbes, for the defendants.

WILLIAM D. ANDREWS AND OTHERS

v.s.

WALTER P. DENSLOW AND OTHERS. IN EQUITY.

In a suit in equity on a patent, a preliminary injunction was granted, on notice and without opposition. Afterwards a decree *pro confesso* was entered, and a reference ordered, which was commenced, and witnesses were examined, and the defendants produced their accounts and attended by counsel. Afterwards they moved to set aside the decree and for leave to file an answer, alleging matters which had been set up in a prior suit on the patent and overruled by the Court, and sundry new matters. No mistake or misapprehension or neglect of counsel was alleged. The plaintiffs offered to limit their recovery to \$500, which would be less than the expense to the defendants of trying the issue. The defendants had ceased to use the patented invention: *Held*, that the motion must be denied, on the plaintiffs stipulating to limit their recovery to \$500.

(Before BENEICT, J., Eastern District of New York, April 5th, 1877.)

BENEDICT, J. This case comes before the Court upon a motion to set aside a decree taken *pro confesso*. The action is founded upon the reissued patent of Nelson W. Green, dated May 9th, 1871, reissue 4,372, for what has been termed "the driven well." The action was commenced in July, 1876. A motion for an injunction was noticed for the 28th day of July, at which time no opposition was made, and the injunction was granted. On the 3d of November, a decree *pro confesso* was taken, no answer having been filed, which decree was regularly signed and entered on November 10th, and a reference to ascertain the amount of the damages was directed. Such reference was thereafter commenced, and several meetings were had and witnesses examined, at which meetings the defendants were represented by counsel. No application was made to set aside the decree until December following. During this period negotiations were being undertaken with a view to an agreement as to the amount of damages, in the course of which the defendants stated that they had no intention of defending the case, and tendered a sum of money for the damages. Now the defendants apply to have the decree set aside, and for leave to file an answer. No excuse is presented for the omission to answer at the proper time. The statement of the defendants, that "they had no idea there was any hurry about the matter," and that "the papers were printed, and I was extremely busy at the time, and I did not pay any special attention to them, or know their exact character," shows that there is no excuse; and the facts warrant the conclusion that the decree was suffered because the defendants had then no intention of defending. The intention to defend was subsequently formed, after the decree in question had been entered, and after the reference had been proceeded with. The decree sought to be set aside was regularly entered. Rule 18 does not require special notice of an application for a decree, when no answer is filed. Besides, here, the defendants and their attorneys knew that the decree had been entered, and they actually attended upon the reference to ascertain damages, where they produced their accounts, and

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witnesses were examined, without objection, although they were then represented by counsel, and this without the suggestion of an intention to contest any other question save that of the amount of damages.

I do not, on this motion, consider whether the defence set up in the answer which the defendants are asking permission to file, can be successful or not. A part of the matter set up has been considered by this Court in an action similar to the present, brought against Carman, and, so far as this Court is concerned, that portion of the answer has been disposed of and will not be again examined here. The other part of the answer, wherein is set forth certain patents and publications that have as yet never been presented to this Court, which are supposed to show a prior description of the subject-matter of this patent, doubtless contains matter as to which the decision of this Court can properly be invoked, when duly presented for determination. It may, therefore, for the purposes of this motion, be assumed that the answer discloses a meritorious defence. The question presented, then, is, whether the possession of a meritorious defence gives the defendants a right to have a regular decree *pro confesso* set aside, without regard to other circumstances. I know of no such rule. To entitle a defendant to be relieved from such a decree there must be a meritorious defence, and it must also appear, that, as between the parties to the action, equity requires that the defendant be allowed to interpose his defence. In the present case, no such equity exists, for the reason that the plaintiffs offer to limit their recovery to the sum of \$500, which, it is plain to see, is less than the expense to which the defendants would be put, in case of a trial upon the issues raised by the answer. As to the injunction, the defendants make no objection, having ceased to use the plaintiffs' patent.

This is, then, a case where the plaintiffs obtained a regular decree *pro confesso*, not by means of any mistake or misapprehension of facts, or neglect of counsel, but through the deliberate intention of the defendants not to defend, and where the defendants now ask to be relieved from the effects of their

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omission to answer, although the result of granting such relief will be of no advantage to them and a disadvantage to the plaintiffs. For, it is apparent, from the nature of the action and of the questions involved in controversy, that holding the decree will, in view of the damages asked, require of the defendants no greater outlay of money than will be required by the trial which they seek; while, if the decree be set aside, the plaintiffs will thereby be put to large expense. A trial under such circumstances would seem to be a waste of money. The legal right of every citizen to spend money in litigation is not to be doubted, but it is a right that can be abandoned. In a case like the present, equity requires it to be held that the abandonment by the defendants of their right to defend upon the merits was final, and that the plaintiffs cannot be required to surrender their decree regularly obtained and deliberately suffered. The motion is, therefore, denied, upon the plaintiffs stipulating to limit their recovery to the sum they have named, \$500.

Tracy & Catlin, for the plaintiffs.

Betts, Atterbury & Betts, for the defendants.

IN THE MATTER OF FRANK FRISBEE AND JOHN MCHUGH,
BANKRUPTS.

A general assignment for the benefit of creditors, without preferences, is an act of bankruptcy.

Under § 5021 of the Revised Statutes, as amended by § 12 of the Act of June 22d, 1874, (18 U. S. Stat. at Large, 180,) the limiting by the bankruptcy Court of the time to be allowed for the requisite number and amount of creditors to join in a petition in involuntary bankruptcy, and the peremptory provision for the dismissal of the petition, are consequent on the judicial ascertainment by the Court that the requisite number and amount of creditors have not petitioned, and such ascertainment is to be made on reasonable no-

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tice to the creditors, and, until such ascertainment has taken place, further creditors may at any time unite in the proceedings.

(Before JOHNSON, J., Southern District of New York, April 5th, 1877.)

JOHNSON, J. The substantive grounds upon which the reversal of the adjudication is sought have been already disposed of by the Court in *In re Beisenthal*, (*ante*, p. 146.) It was there held, that a general assignment for the benefit of creditors, without preferences, was voidable by the bankrupt's assignee within the time limited by statute. Upon the same grounds such an assignment is an act of bankruptcy, as has been frequently held in the Courts of the United States in this Circuit.

The remaining question depends upon section 5021 of the Revised Statutes of the United States, as amended by section 12 of the Act of June 22d, 1874, (18 *U. S. Stat. at Large*, 180.) By the provisions of that section, if the allegation of the petition as to the number or amount of the petitioning creditors is denied by the debtor, by a statement in writing to that effect, the Court is to require the debtor to file a full list of the creditors, with the particulars pointed out by the statute, and is also to ascertain, upon reasonable notice to the creditors, whether one-fourth in number of the creditors, and one-third in amount of those having provable debts, have petitioned. If it appears that such number and amount have not so petitioned, the Court shall grant reasonable time, not exceeding ten days, within which other creditors may join in such petition, and thus make up the number and amount required by the statute. The statute contains a very peremptory provision, that if, at the expiration of the limited time, the number and amount of creditors applying shall not answer the requirements of the section, the proceedings shall be dismissed. This limitation of time and this peremptory provision for dismissal, are consequent upon the judicial ascertainment by the Court that the requisite number and amount of creditors have not petitioned. This ascertainment is to be made upon reasonable notice to the creditors, in order that they may take part, if

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they see fit, in the inquiry that the judge is to make. Until that ascertainment has taken place, the matter remains at large, and further creditors may come forward and unite in the proceedings.

We can only ascertain what has taken place in a judicial proceeding by consulting the written record of the action of the Court. Otherwise, no certainty could be arrived at in respect to such proceedings, and it might become necessary for judges to enter the field of affidavit making, and be subject to the criticism which such a position involves. In this case the papers show the written denial by the debtors that the requisite number and amount of creditors had united in the petition. This was presented to the Court on the 20th of January last, in proper time, and raised a proper issue in the case. No order thereupon appears to have been entered in the clerk's office, nor any decision by the District Court upon the sufficiency of the petition. Upon the minutes of the judge, kept by himself in Court, an entry appears of the presentation of the denial and of an order of reference. The known practice of the Court, as well as the necessary requirements of the law, make it plain that this was intended as the authority to the clerk to enter an order of reference upon the inquiry whether a sufficient number of creditors, and for a sufficient amount, had signed the petition; and to notice of this proceeding creditors were entitled. No reference appears to have taken place and no order seems to have been actually entered. The case, therefore, did not arise in which the judge is called upon by the statute to fix a time within which additional creditors may join in the petition. The petitioners are, therefore, necessarily in error in supposing that the supplemental petition was presented, asking for the adjudication, after the time when the Court had power, under the statute, to entertain the same.

The supplemental petition for adjudication having been presented, the debtors, on the 3d of March, put in their answer, in which they did not set up the want of a sufficient number and amount of petitioning creditors, but only put in issue the alleged acts of bankruptcy. At the same time the

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debtors presented an application asking the dismissal of the original and supplemental petitions for adjudication of bankruptcy, upon the ground of the expiration of the time within which such supplemental petition could be filed according to law, and claiming that the Court had lost jurisdiction of the cause. But, as we have already seen, the proper foundation of fact was wanting, by which to support such application.

Subsequently, and on the 10th of March, the debtors presented a petition, stating, among other things, that on the adjourned return day of the order upon the supplemental petition, by inadvertence, no allegation was made that the requisite number and amount had not joined in the supplemental petition, and it is averred that neither in number nor amount were the requisite creditors included in the supplemental petition; and it was thereupon prayed that the petition should be dismissed. It was not averred, that, taking both petitions together, creditors to the requisite number and amount had not joined. Upon this petition an order was made by the District Court, refusing to dismiss the proceedings for adjudication, whether the petition was to be regarded as an application for the favor of the Court or as matter of right, which was duly entered March 10th. An adjudication of bankruptcy followed in due course. The only objections to it are those which have been already considered, and those, I am of opinion, do not avail. The proceedings and adjudication of bankruptcy must be affirmed, and an order will be entered accordingly and transmitted to the District Court.

Hatch & Van Allen, for the bankrupts.

Thomas M. North, for the creditors.

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A mortgage was given on a vessel and was recorded in pursuance of section 1 of the Act of Congress of July 29th, 1850, (9 *U. S. Stat. at Large*, 440,) now § 4192 of the Revised Statutes of the United States. Afterwards, and while she was in the possession of her owner at her home port in Buffalo, New York, repairs were there done to her, on the credit of the vessel. The statute of New York gave a lien on the vessel for such repairs, in preference to all other liens, except seamen's wages. After the repairs were made the mortgage was foreclosed and the vessel was sold, and was purchased by the claimant, on the foreclosure sale. Afterwards a libel *in rem* was filed against the vessel to enforce such lien for repairs: *Held*, that such lien had priority over the title acquired under the foreclosure of the mortgage.

(Before JOHNSON, J., Northern District of New York, April 7th, 1877.)

THIS was a libel *in rem*, filed in the District Court. After a decree for the libellant in that Court, the claimants appealed to this Court. The decision of the District Court, (WALLACE, J.,) was as follows :

“ This cause involves the single question, whether a title, acquired under the foreclosure of a mortgage on a vessel, is subject to the lien for repairs subsequently bestowed upon the vessel, given by the laws of New York. The mortgage was duly recorded pursuant to section 4192 of the Revised Statutes of the United States, and thereafter, while the vessel was in possession of the owner, the engine of the propeller was repaired by the libellant, on the credit of the vessel, at her home port, in Buffalo. The laws of New York confer a lien for such repairs, which is to take preference of all other liens upon the vessel, except seamen's wages. After the repairs were made the mortgage was foreclosed, and the vessel was purchased by the claimant, upon the foreclosure sale. Subsequently this libel was filed and process *in rem* issued to enforce the lien for repairs. The question thus presented is of great practical importance. Since the 12th Admiralty rule was modified in 1872, vessels upon which there are mortgages are daily seized upon process *in rem* issued from this Court, to enforce liens for supplies or repairs conferred by the

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laws of New York, and, doubtless, a similar practice prevails in the other Courts of Admiralty sitting within States where such liens are given by the local law. These laws exist in nearly all the States having navigable waters within their borders or contiguous thereto, and the question now presented, with modifications arising from the terms of the local laws, has arisen in other Courts of Admiralty exercising jurisdiction over the lakes and the navigable waters connecting the same. The precise question was decided adversely to the priority of the lien for repairs, in the District Court of the United States for the Northern District of Ohio. (*Scott's Case*, 1 *Abb. U. S. Rep.*, 336.) I regret to be unable to concur in the conclusion there reached. The intimate commercial relations between the citizens of the several States upon the lakes, subjecting them, of necessity, to the contingency of adjudications in different Courts of Admiralty, renders it highly important that these Courts should apply a uniform rule of decision upon a question of this kind. Investments are made, securities taken, credit given, and commercial transactions conducted, in reliance upon the legal rights of the parties to them, as declared by the decisions of the Courts. The uncertainty introduced into these transactions, if the rights of the parties depend upon the adjudication of different tribunals which entertain different views, is so discouraging and depressing to commerce between the citizens of these States, as to render applicable the remark of Lord Ellenborough, in *Rex v. Eccleston*, (2 *East*, 302 :) that it is "often of more importance to have the rule settled than to determine what it shall be." But, the importance of the question involved, the expediency, in the interest of commerce, of protecting claims for supplies and repairs to vessels, the strong natural equity of such claims, and the hope that what I conceive to be the true rule may be determined before precedents give stability to what I deem an error, have induced me to disregard the case of Scott, and assign briefly the reasons which lead me to defer the mortgage to the claim for supplies. No doubt exists as to the competency of State legislation to determine the rank of liens upon domestic vessels,

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when it does not invade the jurisdiction of the Courts of Admiralty, or the legislation of Congress concerning such liens; and Courts of Admiralty will enforce the lien given by the local law, by process *in rem*, where the cause of action is maritime in its nature, and, where the claim is not maritime, will recognize the lien, in the distribution of proceeds in the registry of the Court. (*The St. Lawrence*, 1 *Black*, 522; *Peyroux v. Howard*, 7 *Peters*, 324; *The Orleans v. Phoebus*, 11 *Peters*, 175.) In enforcing the lien given by local laws, Courts of Admiralty are governed by the terms of these laws, where they are explicit, and not by the general doctrines of maritime law. (2 *Parsons on Shipping and Admiralty*, 324.) It follows, that, inasmuch as the statute of New York gives preference in rank to the lien for repairs over all other liens, except for seamen's wages, the important inquiry is, whether the rule thus prescribed is repugnant to the rules which control Courts of Admiralty in assigning rank to liens, or repugnant to any legislation of Congress over vessels of the United States. The legislation does not trench upon any of the rules of the Admiralty regulating priorities between liens, because neither of the liens involved are maritime liens. As to other liens, in dealing with questions of priority, Courts of Admiralty are governed by equitable principles. Thus, in accordance with the equitable rule which favors diligence in asserting a lien, when several claims of the same rank exist and a decree has been obtained on one, that claim is accorded priority over the others, (*The Globe*, 2 *Blatchf. C. C. R.*, 427;) and, following the equitable rule, that equality among creditors is equity, claims of the same rank will be discharged ratably, if all cannot be paid in full, where no priority has been acquired by diligence. (*The William F. Safford*, 1 *Lush. Adm. R.*, 69.) But, it is a controlling rule in Admiralty, that priority between claims depends not upon precedence in date, but upon the favor due to the nature of the claim; priority in time must yield to priority in rank; the claim of the material man must give way to that of the seaman, and both to that of the salvor; and, as between holders of bottomry bonds, the last in

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point of date is entitled to priority of payment, because the last loan furnished the means of preserving the ship, and, without it, the former lenders would entirely have lost their security. (*Abbott on Shipping*, 11th ed., 619.) Applying this rule, in determining the question of priority between a mortgage and a claim for repairs, it seems very clear that the latter should be regarded with the highest favor, and should outrank the mortgage. "There is nothing," says Emerigon, "which is regarded with so much favor as debts for work and labor furnished to a vessel." If the repairs are done upon a foreign vessel, the claim constitutes a maritime lien, to which, of course, an earlier lien not maritime must give way. If they are done upon a domestic vessel, the same lien is conceded to the claim by the civil law, the particular maritime codes, and the general maritime law of all nations, except in Great Britain and the United States, where the maritime lien elsewhere universally acknowledged has been displaced by the encroachments of the common law Courts of England upon the jurisdiction of the Admiralty. It has been strenuously contended by many of the ablest jurists of our own country, that the maritime lien still exists in the Admiralty jurisprudence of the United States, and many learned judges have concurred in the opinion, but the question is now finally at rest, and the maritime lien is denied when the repairs or supplies are furnished to domestic ships. (*The Lottawanna*, 21 Wall., 558.) The high favor with which the claim is regarded, and the strong natural equity which sustains it, is evidenced by the local laws enacted in England and in more than twenty of the States of this Union, to place the claim upon the same footing with maritime liens. If, however, the argument, that priority between liens not maritime is to be determined upon analogies derived from the law of maritime liens, should be deemed unsatisfactory, another reason exists why the lien here should rank side by side with maritime liens, and that is found in the complete assimilation in the character of the liens, which is effected by the local law. When it is considered that the true meaning and efficacy of a maritime lien is simply

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that it renders the vessel liable to the claim without a previous judgment of sequestration or condemnation, and without establishing the demand as at common law, and that the action *in rem* carries the lien into effect, (*Ingraham v. Phillips*, 1 Day, 117; *Barber v. Minturn, Id.*, 136,) it will be seen that no practical distinction exists between a maritime lien and a claim for repairs for which a lien is given by the local law; and that no reason exists why Courts of Admiralty should not treat the latter as a maritime lien. When the cause of action is of maritime cognizance, the action *in rem* may be prosecuted in the Courts of Admiralty, and the vessel seized without a previous condemnation, and without establishing the demand, to enforce the lien given by the local law, precisely as in the case of a maritime lien. It remains to inquire whether the lien given by the State law contravenes any legislation of Congress concerning ships and vessels. As is said in *White's Bank v. Smith*, (7 Wall., 646 :) "Congress having created, as it were, this species of property, and conferred upon it its chief value, under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein." The only statute of Congress bearing upon the present question is that by which mortgages on vessels are required to be recorded in the office of the collector of customs where the vessel is registered or enrolled, in order to be valid as against any person having no notice of the mortgage. It has been held that, by force of this statute, a mortgage is valid notwithstanding State legislation which requires additional formalities calculated to give notice to creditors or subsequent purchasers. (*Aldrich v. Aetna Co.*, 8 Wall., 491.) It has been argued, that the States can pass no laws which can affect the validity of mortgages so recorded. That Congress could invest mortgages on vessels with such invulnerability, is probably true, but no such intent can fairly be implied from the language of the Act. It is a registration Act, and, as such, excludes all State legislation upon the same subject; and this

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was the only point decided by the Supreme Court in *Aldrich v. Etna Co.* It has been held, that liens given by the laws of a State for supplies furnished a domestic vessel, take preference over a mortgage subsequently recorded. (*The Harrison*, 2 *Abb. U. S. Rep.*, 74.) This conclusion of necessity involved the proposition that the States are competent to create liens which will take preference to the lien of a mortgage recorded pursuant to the Act of Congress; and I see no reason to doubt their competency to determine the conditions of priority, so long as they do not infringe upon the legislation of Congress, by imposing additional requisites in the recording of mortgages. My attention has been called to the cases of *The Skylark*, (2 *Bissell*, 251,) *The Grace Greenwood*, (*Id.*, 131,) and *The Lady Franklin*, (*Id.*, 121,) where the mortgage was held to have priority. These cases are not applicable here, because the local law did not give a lien paramount to the mortgage. A decree is ordered for the libellant."

Williams & Potter, for the libellant.

Davis & Clinton, for the claimant.

JOHNSON, J. The question presented in this case is one of interest and importance. After a careful examination, I am satisfied that it has been correctly decided by Judge Wallace, and that the arguments which his opinion presents ought to control the disposition of the cause. It would be quite useless to restate them, and I only desire to add a few words, in further elucidation of the force of the Act of July 29th, 1850, (9 *U. S. Stat. at Large*, 440,) which provides for recording the conveyances of vessels. It enacts, (§ 1,) "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector

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of the customs where such vessel is registered or enrolled ; provided, that the lien by bottomry on any vessel, created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this Act." The obvious purpose of this proviso was to make it entirely clear that a bottomry bond did not come within the statute requiring certain instruments to be recorded. It might otherwise have been contended that it was, in some sense, a hypothecation of the vessel, and, therefore, required to be recorded. It will be observed, that the proviso is confined to liens by bottomry. If this proviso be construed to mean that such a lien only is out of the purview of the statute, and that all other liens are postponed to that of a mortgagee, then the claims of salvors, and all those having other strictly maritime liens, would be thus postponed, to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle upon which this statute can be expounded to give such a priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of the maritime law, upon the subject of maritime liens. This statute, I conclude, therefore, has no relation to the question involved ; and the lien of the libellant is left to stand upon the statute of New York, which the Courts of the United States do enforce in the Courts of Admiralty.

Judgment must be given for the amount recovered in the District Court, with the costs of that Court, and of the appeal in this Court.

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IN THE MATTER OF HENRY SCHWARTZ, A BANKRUPT.

Section 5106 of the Revised Statutes, which enacts that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit therefor against the bankrupt, until the question of his discharge shall have been determined, applies to all provable debts, as well to those which, under § 5117, would not be discharged, as to others.

A claim arising out of a contract for the purchase and sale of merchandise is a provable debt, within § 5106, although the sale was made because of a false representation by the debtor as to his pecuniary affairs, and the prosecution of such claim may be enjoined, under § 5106, if it be prosecuted in an action sounding in damages.

(Before JOHNSON, J., Southern District of New York, April 9th, 1877.)

JOHNSON, J. On the 4th of March, 1876, the District Court denied an application made by the petitioners to vacate a stay of proceedings in a suit in a State Court against the bankrupt, brought by them, and which had been stayed by an *ex parte* order of the District Court, on the 14th of February, 1876. The petitioners now apply to have this order of March 4th, 1876, reversed, upon review, in this Court. The question involves the construction of section 5106 of the Revised Statutes. This section enacts, that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." It is contended, on the part of the petitioners, that, notwithstanding the generality of the language employed, which embraces every provable debt, it ought to be construed not to include any debt which, under the provisions of section 5117 of the Revised Statutes, would not be discharged even though the bankrupt should obtain the statutory discharge. Debts of this class are designated, in that section, as those created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character. They further insist, that the demand upon which their suit is brought against the bankrupt is not a provable

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debt. This latter proposition cannot, in my judgment, be maintained. Their statement of their own case shows that the claim originated in what, in form, at least, was a contract for the purchase by the bankrupt, and the sale by them to him, of merchandise in the line of his business. The fact that he is charged with having fraudulently induced the petitioners to make the sale, by false representations of his pecuniary affairs, does not exclude the claim from the class of provable debts. It is still the price that is claimed, under the name of damages for the fraud. Even if their complaint in the State Court is so framed that they cannot recover unless they prove the fraud, according to the laws of the State, it does not cease to be, in the language of the bankrupt Act, a debt created by the fraud of the bankrupt. Had the action of the petitioners taken the form of an action for the recovery of the specific merchandise sold, founded upon a complete rescission of the contract, a different question would have been presented. Where a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery.

The question to be determined in this case is, therefore, the general one, whether, the debt being provable, the creditor is at liberty to proceed, upon the ground that debts which cannot be discharged are impliedly excepted from the purview of section 5106. This question has been fully discussed in several cases, in the District Courts. (*In re Rosenberg*, 3 *Benedict*, 14; *In re Ghirardelli*, 1 *Sawyer*, 343.) I concur entirely in the views presented by Judge Blatchford, in the opinion in the first of the cases cited. The bankrupt is entitled, until the question of his discharge is settled, to be protected by the Court in bankruptcy, except in the cases specified in the bankrupt law. That the creditors have not proved their claim in the bankruptcy does not affect the question. The section relates to debts provable, which, of course, includes those which have not been proved.

As the application of the petitioners to vacate the stay of

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proceedings followed so closely the granting of the stay, there cannot have been at that time any unreasonable delay, on the part of the bankrupt, in endeavoring to obtain his discharge. The adjudication of the defendant to be a bankrupt, on his voluntary application, was in December, 1875, his assignee was appointed February 10th, 1876, and the application for a stay of proceedings immediately followed, as before stated. On this review, the decision must have relation to the facts upon which the District Court acted.

The order under review must be affirmed, and the clerk will certify to the District Court that the order of that Court in this matter, made March 4th, 1876, refusing the application of the petitioners to vacate the stay of proceedings and injunction granted on the 14th of February, 1876, is affirmed.

• *Anthony R. Dyett*, for the creditors.

• *Alexander Blumenstiel*, for the bankrupt.

RICHARD P. BRUFF

vs.

WILLIAM A. IVES. IN EQUITY.

The reissued letters patent granted to Richard P. Bruff, assignee of James Swan, October 21st, 1873, for an improvement in machinery for manufacturing curved or gauge-lip augers (the original letters patent having been issued to said Swan June 9th, 1868,) are valid.

The invention defined and the claims of the patent construed.

(Before SHIPMAN, J., Connecticut, April 12th, 1877.)

SHIPMAN, J. This is a bill in equity charging an infringement by the defendant of reissued patent No. 5,624, dated October 21st, 1873, which were issued to Richard P. Bruff,

assignee of James Swan, for an improvement in machinery for manufacturing curved or gage-lip augers. The original patent was issued to said Swan on June 9th, 1868. Since the suit was brought, the patent has been assigned by the plaintiff, and no injunction is now asked.

In the manufacture of augers, the end of the bit blank is first cut out into a trident-like shape, and the body of the blank is then twisted into the form of an auger. The central prong at the end of the blank becomes the pivot of the auger, and the two other prongs become the floor lips or cutting edges. Formerly, these cutting edges were formed by hand. The operation of bringing or drawing the cutting edges so as to start from the base of the screw, and to continue in a line with the axis of the thread upon the pivot of the auger, was a difficult one, and required skilled labor. The patentee describes the object and nature of his invention as follows: "In making augers or bits of the above description," (viz., curved or gage-lip augers,) "it is necessary to leave a sufficient thickness of metal at the bit to admit of the point or screw being formed, after which the lips require to be reduced and brought to a knife-like edge at their cutting parts, which process is termed "upsetting," and has hitherto been done by hand; but the most skilful workman can scarcely obtain a perfect form of cutters, and perfect uniformity in the two lips is rarely ever obtained. In my invention, I employ gripping or clamping jaws, that grasp and firmly hold the auger-blank just above the lips, the jaws being fitted to receive the helical threads of the auger blank, and, in connection with these jaws, swaging or drawing dies, to which is imparted a rotative movement while they are in contact with the lips of the blank, such rotative movement upsetting the auger-lips and forming them to shape against the griper-dies." The machine consists, in general, of two jaws connected at one end by a pivot, which have dies inserted in their opposite ends, to receive and hold the screw portion of the auger, while its cutters or lips are being operated upon. The specification describes the dies as follows: "The upper surfaces of the dies B, B, are grooved

or hollowed out to conform to the desired shape of the lips or cutters, as shown at C, C." An arbor is fitted upon the socket of a curved standard, which arbor rotates and moves longitudinally to and from the auger or bit. To the lower end of the arbor the swaging or drawing dies are fitted. These dies act upon the lips or cutters of the bit when the arbor is moved, and the lips are drawn out to a thin edge against the ends of the jaws by the rotative and forward action of the swaging dies. The mechanism by which the various parts are operated is fully described in the specification, but a sufficient description has been here given for the purposes of this case. The first two claims of the patent are alleged to have been infringed. There are: "1. The combination of clamping-jaws, having dies formed to receive the screw thread of an auger, with a rotative die for upsetting the auger-lips, the jaws and die acting in conjunction to draw the lips, and the combination being substantially as shown and described. 2. The described method of forming or drawing the lips of augers, the auger-blank being first clamped in jaws formed to receive the auger-screw, (the lips extending beyond the jaws,) and the lips being then upset and drawn against the ends of the jaws by the rotative and forward action of a die, the ends of the jaws being formed to shape the lips under the action of the die."

Infringement by the defendant of these two claims is not denied. The defence which was relied upon at the trial, was want of novelty of the patented machine, resulting from the public use, prior to the date of the invention, of a machine made by Ransom Cook, and known as the Cook machine. After the end of the blank had been stamped into a trident-like shape, and after the body of the blank had been twisted, the Cook machine receives the bit blank in clamping dies which fasten into the twist of the auger. A die, called upon the trial a forming die, and, by the mechanics who operated the machine, called a wringer, being a transverse bar with a cavity in the centre, and with a spiral incline outside of the centre, was then brought forward in contact with the end of

the central prong of the bit, and rotated, by which rotation the two outside prongs were twisted, so that they were very nearly at right angles with the axis of the blank. At this point, the parties were at variance upon a question of fact, the defendant contending, that, by this rotatory and forward motion of the forming die or wringer bar, the lips or cutting edges were substantially formed as in the Swan machine, and that the floor lip was drawn out, abreast of the central prong, in a line with the thread upon the pivot of the auger. It was agreed, that, in the Swan machine, by the action of the swaging dies upon the bit held in the clamping dies, the floor lips were drawn, or rolled out, or plated out, and spread into their proper shape, and the cutting edges were brought into line with the thread of the pivot. The plaintiff insisted that the action of the Cook wringer was nothing more than a twisting of the lips, and that subsequently the metal must be drawn into proper shape, and the proper position must be given to the lips by a hand operation, which required, at least, one or two reheatings, and careful labor.

I am satisfied, from all the testimony, that the primary object of the rotating action of the wringer, was to twist the external prongs into a position from which the lips could thereafter be formed, and that, incidentally, this rotatory action upon the heated metal might have drawn the metal to a limited extent, but that, as a rule, it was necessary to take the blank from the machine and complete the drawing out operation and the spreading of the metal and the adjustment of the lips in line, with a hammer upon the horn of an anvil, and that, previously to this hand operation, an additional twist was sometimes given to the lip, with a pair of tongs, after the blank had been taken from the machine, and that these hand operations were not resorted to merely to "true up," or to remedy occasional incompleteness in the effect produced by the wringer, but were resorted to in order to accomplish what the Cook machine was, from its construction, not able to accomplish.

It will be remembered, that it is necessary to draw the

metal out in order to form a floor lip, and that the cutting edge must start from the base of the screw and continue in a line therewith. It is, therefore, necessary that the thin places at the root of the screw, where the metal has been cut out, must be corrected. This drawing process is effected in the Swan machine by the two dies coming in contact with the metal on its opposite sides, and the swaging and rolling action of the swaging die. The under side of the metal rests on the holding die, and the upper side is pressed upon by the rotating die, and the heated malleable iron is plated out and forced into shape by these two opposing surfaces acting together. In order to draw this metal forward into proper shape, the under side of the lip should rest upon a bevelled surface, and be supported by that surface, and there must be an opposing pressure upon the upper side, as well as a simultaneous forward movement. The Cook machine did not draw forward the lip, because there was no adequate support on the under side. The forming die or wringer twisted the lips, but did not press them against an opposing surface, and by the simultaneous rotary motion draw forward the malleable metal. The superiority of the Swan machine consists in the form of the surfaces of the dies against which the rotating dies press the metal. If the Swan dies were substituted for the Cook dies in the latter machine, the plating out process could be accomplished, although it is very probable that the machine would not be practically successful. It thus appears that the Cook machine was not, in fact, an anticipation of the Swan invention.

But, the defendant insists, that, inasmuch as the first claim of the Swan patent is for a combination of clamping jaws having dies formed to receive the screw thread of an auger, with a rotative die for upsetting the auger lips, the jaws and die acting in conjunction to draw the lips, and inasmuch as the dies upon the clamping jaws are not particularly described, the claim is broad enough to include any dies which will draw or give shape to any portion of the lips, and that such dies have been clearly proved to exist in the Cook machine, which coact to some extent in giving shape to the lips. The object of the

invention is stated in the patent to be, to reduce and bring the lips, by machinery, to a knife-like edge at their cutting parts. The invention consists generally in the combination of the two sets of dies, so that the action of the rotating dies upon the lips clamped by the gripping dies may upset and *form* the lips. It is plain, from the description, that the rotating dies are to act upon the metal upon the upper surfaces of the gripping dies, which upper surfaces are grooved or hollowed out so as to conform to the desired shape of the lips or cutters. The first claim should be construed in connection with the specification, and in view of the actual invention and of the state of the art, and is for a combination of clamping jaws with its described dies and a rotative die, the two sets of dies so acting in conjunction as to draw, that is, to form into shape the lips, and shaped relatively to each other, substantially as shown. The essential feature of this claim is, that the described combination should so coact that the actual and necessary result should be to draw the lips, which result is to be attained in substantially the same way in which it is accomplished by the patented machine, which is, the drawing of the lips against the ends of the jaws by the rotative and forward action of a die, the ends of the two sets of dies being formed relatively to each other so as to shape, and not merely to turn over, the lips under the action of the rotating die. If the jaws and die are shaped relatively to each other so as to accomplish this result, they are within the patent, notwithstanding a variation in form from that which is described. The patent is not, therefore, broad enough to include the Cook mechanism, because the result of the coaction of the Cook dies is not to form into shape or plate out the lips, but is generally to twist the lips into a position from which they can subsequently be drawn out into the proper shape. And, although the Swan dies in the Cook machine might accomplish the drawing out result, that fact does not permit their unauthorized use in the combination, because the Swan dies were unknown, and did not, apparently, exist, previously to their invention by Swan.

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If the plaintiff is the exclusive owner of the mechanism described in the first claim, it is not denied that he has an exclusive right to the process described in the second claim.

Let there be a decree in favor of the plaintiff, for an accounting, and a reference to a master.

Thomas L. Livermore and Benjamin F. Thurston, for the plaintiff.

Charles R. Ingersoll and John S. Beach, for the defendant.

IN THE MATTER OF JOSEPH MOONEY AND ISAAC MOONEY,
BANKRUPTS.

The District Court, on the petition of the assignee of a bankrupt, praying that the bankrupt might be ordered to pay over certain moneys alleged to be in his hands, and might be punished for contempt if he did not obey such order, took proofs on the question. The bankrupt testified that the money was, all of it, expended before the petition for an adjudication of bankruptcy was filed, and gave an account of the way in which it was expended. The District Court made an order denying the prayer of the petition. On review: *Held*, that the application to this Court, on review, to reverse said order, must be denied.

The petitioner for review must satisfy this Court that a wrong decision was arrived at by the District Court, if such decision was one on a question of fact. In this case he must satisfy this Court that a reasonable man would not be able to give credit to the relation given by the bankrupt, but would be satisfied of its substantial untruth.

The District Court having decided that it did not satisfactorily appear that the bankrupt had not made a full disclosure, this Court will sustain such decision, unless satisfied that the District Court ought clearly to have decided the other way.

(Before JOHNSON, J., Southern District of New York, April 20th, 1877.)

JOHNSON, J. This is a petition by the assignee of the bankrupts to review and reverse an order of the District

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Court, made November 25th, 1876, denying the prayer of the petition of the same petitioner, presented to the District Court on the 8th of December, 1875. This petition asked that the bankrupts might be ordered to pay over certain moneys alleged to be in their hands, and might be attached and punished for contempt, if they did not obey such order. An order was made upon this petition, to which the bankrupts had filed an answer, referring it to one of the registers to take proofs upon the issues raised by the answer of the bankrupts, in respect to the moneys alleged to be in their hands. Upon this order voluminous proofs were taken, and reported to the District Court. Upon those proofs the parties were heard, and, on the 10th of June, 1876, an order was made, reciting that the bankrupts had received, between the 1st of January, 1874, and the 16th of July, 1874, the day of their failure, from the assets of their firm, Joseph Mooney, \$7,147 05, and Isaac Mooney, \$8,421, that neither of them had accounted for such sum received by him, and requiring each of them to show, on oath, what he did with the money, and fully account for the same; and it was referred to the same register to take the proofs and report the testimony, with his opinion. A voluminous examination was reported by the register, with his opinion, that each of the bankrupts had in his hands, at the time of the filing of the creditors' petition for the adjudication of bankruptcy, the sum of \$3,300, and advising their commitment as for contempt, in not paying the same to the assignee. Upon the presentation of this report to the District Court, the order was made which is now under review.

I have carefully examined this mass of testimony, and I do not see any ground for fixing any particular sum of money as being unaccounted for by the bankrupts. According to their testimony it was all expended before the filing of the petition against them. The account which they have given of the way in which the money was spent was undoubtedly subject to criticism, and was not calculated fully to satisfy the judgment, but did leave suspicions behind it as to its entire truthfulness. It has, however, been passed upon by the

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District Judge, who has not felt himself able to pronounce that the bankrupts have not complied with the order of the Court, by making all the disclosure which is in their power. It certainly may be true, that they have told all they are able to tell; and it is not claimed that any further examination is likely to yield any further results. The bankrupts have answered all the questions put to them. If their answers are true, they have obeyed the order of the Court. The District Court has not felt it to be its judicial duty to declare them untrue, and to proceed to punish the bankrupts on that basis. In reviewing a decision of the District Court, on a question of fact, and, especially, upon one of this nature, it is for the petitioner to satisfy the Court that a wrong decision has been arrived at. (*In re Dow*, 6 *Nat. Bkcy. Reg.*, 10.) The proposition to be made out must be, that a reasonable man would not be able to give credit to the relation given by the bankrupts, but would be satisfied of its substantial untruth. It would require a very clear case to make that out, in the face of a decision of the District Judge sustaining the bankrupts' story, or, putting it at the lowest, not discrediting their story, so as to feel it right to act judicially on the basis of its wilful falsity. As the question is stated by Judge Drummond, in *In re Salkey*, (6 *Bissell*, 280,)—did it or did it not satisfactorily appear, that the bankrupts had not made a full disclosure?—and to this question the District Court has answered in the negative. With this decision it seems to me my duty to concur, unless I am satisfied that the District Judge ought clearly to have decided the other way. The case of *In re Salkey*, (6 *Bissell*, 269 and 280,) was much stronger than this before the Court. The District Judge, in that case, held the bankrupts not to have made a full disclosure and committed them. Eight months before their failure, they had bought goods to the amount of \$35,000, had not paid for them, and had left only \$6,000 worth, at their own valuation. They gave no account whatever, as to what had become of them. Yet, Judge Drummond, when the bankrupts were brought before him on *habeas corpus*, thought it proper, while

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holding that the power of the District Court was complete, and that there was no relief to be given on *habeas corpus*, to send the parties back before the register who had charge of the case, in order that, upon their further examination, he might report whether the bankrupts had made a full disclosure of what they knew. The English cases which were cited, *In re Bradbury*, (14 *Com. B.*, 15,) *Ex-parte Nowlan*, (6 *T. R.*, 118,) *Rex v. Perrot*, (2 *Burrow*, 1122 and 1215,) and *Ex-parte Lord*, (16 *M. & W.*, 462,) are founded upon statutes conferring expressly the power upon the commissioners, if, in their opinion, the examination of the bankrupt is unsatisfactory, to commit him. I do not think our statute is as broad as the English statutes, and, therefore, the decisions founded upon them are not entirely safe guides as to the powers to be exercised under our statute. The application to this Court, upon review, to reverse the order of the District Court in this matter, made and entered November 25th, 1876, is, therefore, denied, and the clerk will certify this order to the District Court.

Alexander Blumenstiel, for the assignee.

Richard S. Newcombe, for the bankrupts.

IN THE MATTER OF WILLIAM MOLLER AND OTHERS, BANKRUPTS.

A creditor of a bankrupt, after the adjudication in bankruptcy, brought a suit in a State Court for the foreclosure of a mortgage made to him by the bankrupt, and made the assignee in bankruptcy a party defendant to the suit, without obtaining the permission or direction of the bankruptcy Court to bring such suit: *Held*, that the State Court had authority to entertain the suit; that its prosecution was not a contempt of the authority of the bankruptcy Court; and that the proceedings in it were not void.

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Held, also, that the bankruptcy Court had power to allow the creditor to prove a debt for the deficiency arising on the sale under the decree in the foreclosure suit, although no preliminary permission had been obtained from it to institute the suit.

The decision of the District Court in *In re Moller*, (8 *Benedict*, 526,) as to the priority of certain debts of the bankrupt for taxes, assessments and water, rates, under subdivision 3 of § 5101, of the Revised Statutes, affirmed.

(Before JOHNSON, J., Southern District of New York, May 2d, 1877.)

JOHNSON, J. An adjudication of bankruptcy was had against William Moller, George H. Moller and William F. Moller, on the 20th of November, 1875, upon a petition of their creditors, filed October 28th, 1875, in the District Court of the Southern District of New York. William A. Booth, having been elected assignee, received an assignment of the bankrupts' property on the 13th of December, 1875. In the course of his administration of the estates of the bankrupts, questions arose which were presented to the District Court. Its determination being adverse to the positions taken by the assignee, he has brought the questions before this Court by six appeals; and, either as appeals, or as applications for the exercise of the superintending jurisdiction of the Circuit Court, they are properly before the Court for determination.

In four of the cases, the creditors, who were mortgagees of one or more of the bankrupts, commenced suit for the foreclosure of their respective mortgages in the State Courts, after the adjudication in bankruptcy, and made the assignee in bankruptcy a party defendant, without obtaining any leave or direction of the District Court in bankruptcy, permitting or directing the bringing of such suit. It is claimed, on the part of the assignee, that the State Courts had no authority to entertain these suits, that their prosecution was a contempt of the authority of the bankruptcy Court, and that the proceedings are void. These positions are not consistent with the provisions of the bankrupt Act. Section 5056 imposes the only condition which is required by the bankrupt Act, in terms, to be performed before suing an assignee in bankruptcy, and that is, that twenty days' notice shall be given him before suit for

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anything done by him as such assignee. But it is not necessary or suitable that the question should, in this Court, be examined as an open one, since the Supreme Court of the United States has decided it. In *Eyster v. Gaff*, (1 *Otto*, 521, 525,) the Court says: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other Court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other Courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt Court, by the service of a rule to show cause and to dispose of their rights in a summary way. This Court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same Courts remain open to him in such contests, and the statute has not divested those Courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee, in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the State Courts." In the particular case, the bankruptcy occurred after the commencement of the suit, and the decision might, in terms, have been limited to that special state of facts; but the Court chose to put it upon the broader grounds which it has expressed, and which apply equally to cases where the bankruptcy precedes the suit in a State Court. The views of the Supreme Court of the United States upon this subject were further explained in *Burbank v. Bigelow*, (2 *Otto*, 179.) In that case, the complainant filed a bill for an account against one Edmond B. Bigelow, in the Circuit Court of the United States for the District of Louisiana. Shortly before the filing

of this bill Bigelow had been adjudicated a bankrupt in the District Court of the United States for the District of Wisconsin, but his assignment was not made until three days after the filing of the bill. No reasons were assigned in the Circuit Court, showing the grounds upon which it dismissed the bill; but the Supreme Court of the United States understood the dismissal to have proceeded on the ground that the controversy belonged exclusively to the bankruptcy Court in Wisconsin, as an incident to the bankruptcy of Edmond B. Bigelow. After the assignee's appointment, Bigelow answered on the merits, and then an amended and supplemental bill was filed, making the assignee in bankruptcy a party, who subsequently appeared, and having, by order of the Court, been subrogated to the rights of Bigelow, filed an answer adopting the defence previously set up by the bankrupt. The assignee afterwards filed another answer, claiming that the District Court of Wisconsin alone had jurisdiction. Upon this case the Supreme Court, after asserting the jurisdiction of the Circuit Court, under section 4979 of the Revised Statutes, proceeds to show, that, without reference to the jurisdiction conferred by that section, the Circuit Court had jurisdiction to maintain the suit. The argument is, that, when the State Courts have jurisdiction, the Circuit Courts of the United States have it also, if the proper citizenship of the parties exists; and that, as such citizenship existed in the case before the Court, and as it was within the jurisdiction of a State Court, a Circuit Court of the United States also had jurisdiction. In regard to the point of State jurisdiction the Court says: "We recently held, in the case of *Eyster v. Gaff*, that the bankrupt law has not deprived the State Courts of jurisdiction over suits brought to decide rights of property between the bankrupt, or his assignee, and third persons; and, whenever the State Courts have jurisdiction, the Circuit Courts of the United States have it, if the proper citizenship of the parties exists. In the case last referred to, a suit to foreclose a mortgage was commenced before the mortgagor went into bankruptcy; but the decree was not rendered until

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after that event and the appointment of an assignee. We decided that the validity of the suit or of the decree was not affected by the intervening bankruptcy; that the assignee might or might not be made a party; and, whether he was or not, he was equally bound with any other party acquiring an interest *pendente lite*."

The principle of these cases derives confirmation, if that be necessary, from the cases of *Norton v. Switzer*, (3 *Otto*, 355,) and *Clafin v. Houseman*, (*Id.*, 130.) I entertain no doubt, therefore, that the general proposition on which the appellant in these cases relies is unfounded, and that the State Courts had jurisdiction to maintain the several actions which were instituted to foreclose the mortgages involved in them. No question is presented as to the power of the District Court to enjoin the prosecution of any of those suits, if, in its judgment, that course had been deemed conducive to justice. Such an injunction was asked for in only two of the cases and was denied in each. The grounds of these applications do not appear upon the appeal papers, and no question was made in respect to them, at the bar.

In the next place, it is claimed, on the part of the appellant, that the District Court had not power to allow the mortgage creditors to prove for a deficiency in four of the cases in which no preliminary permission to institute the foreclosure suits had been obtained from the District Court. The appellant's position is based upon the provisions of section 5075 of the Revised Statutes, which enacts, that a mortgage creditor of the bankrupt shall be admitted as a creditor only for the balance of the debt, after deducting the value of the mortgaged property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. It then provides, that, "if the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such

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excess; or he may sell the property subject to the claim of the creditor thereon; and, in either case, the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction." It then enacts, that, "if the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt." Upon this section, it must be observed, in the first place, that the secured creditor may proceed, without the order or the sanction of the bankrupt Court, to realize his security; and, in the second place, that, with the sanction of the Court or of the assignee, he may avail himself of the full value of his security, and be admitted as a creditor for the deficiency. The statute is not modal in its provisions, but substantial. It does not concern itself with the order of time in which the business shall be transacted, but with the fact that the Court approves, or the assignee agrees.

. In four of the cases before the Court, which are in the papers respectively designated as the Fifth Avenue, Westchester, Sugar-house, and Sloane cases, the circumstances are slightly different, though, in each, dower rights or other incumbrances existed, which made a title under the decree of a Court of general jurisdiction more marketable than any that could be given under the direction of the bankrupt Court alone.

In the Fifth Avenue case, the assignee was made a party defendant, but did not answer, and a decree was regularly passed by the State Court, and a sale was had, in which the creditor, being the highest bidder, became the purchaser. He then, without attempting to take possession, applied to the Court in bankruptcy, averring that he had bid the full value of the property, asking the sanction of the Court, and offering to submit to a resale of the clear title, and to convey accordingly, if the bankruptcy Court should so order. In answer to this application, it was not shown that the full value had not been bid for the property, nor was any ground taken in opposition, except the somewhat inconsistent legal grounds, that the proceedings in the State Court were inoperative, and that, having taken them, the creditor ought not

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to be allowed to prove for the deficiency. The Court refused to sustain either of these grounds, sanctioned the sale which had taken place and permitted the creditor to prove for the deficiency. This decision is supported by the case of *In re The Iron Mountain Co.*, (9 *Blatchf. C. C. R.*, 320,) before Judge Woodruff, in all points except as to the deficiency. In regard to that, Judge Woodruff remarks, at the close of his opinion, that, by electing to pursue the mortgaged premises, the claimants of the lien would deprive themselves of any right to prove their debt for the deficiency. This remark was not necessary to the decision of the cause, and was not, probably, intended to refer to anything but a final election not to submit to the authority of the bankruptcy Court, in ascertaining the value of the property.

The Westchester case did not differ greatly from that which has just been considered. The assignee answered in the State Court, setting up, in substance, the alleged want of jurisdiction and was beaten in that Court. He had also previously applied to the District Court to enjoin the further prosecution of the suit, and this application was denied. These circumstances do not serve to take the case out of the rule previously stated.

In the Sugar-house case, after the suit in the State Court was ready for a decree, the assignee being a party, and having applied to the District Court for an injunction, which was denied, the creditor applied to the District Court to order a sale and to fix the deficiency, and this was granted, and correctly granted, unless what has been already said in this opinion is completely erroneous.

In the Sloane case the assignee was made a party defendant, answered the bill in the State Court, then, by stipulation, withdrew his answer, reserving the right to special notice of the sale, received such notice, and himself also advertised the sale. In respect to this part of the case, the circumstances of which are particularly discussed in the opinion of Judge Blatchford, in the District Court, (*In re Moller*, 8 *Benedict*, 526,) I think it unnecessary to add anything.

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The Sloane case, as well as those of Gerdes and of Cooper, present questions in respect to the payment of taxes, assessments and water rates by the assignee, as debts entitled to priority in payment, under section 5101 of the Revised Statutes, sub-division third. These questions are amply discussed in the opinion of Judge Blatchford, and are disposed of in accordance with my understanding of the law. In both branches of the Sloane case, and in the Gerdes and Cooper cases, that opinion is adopted by this Court.

The orders appealed from are affirmed, with costs.

William H. Scott, for the assignee in bankruptcy.

John E. Parsons, Edmund Coffin, Jr. and Jacob F. Miller, for the creditors.

AARON S. BRIGHT

vs.

THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY AND
OTHERS. IN EQUITY.

The plaintiff in a suit in equity in a State Court presented to that Court, on the 4th of February, 1876, a petition for its removal to this Court, under the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470,) with the proper bond. The session of this Court next after the 4th of February began, by law, on the last Monday of February. The plaintiff did not file in this Court a copy of the record until the first day of the ensuing April term of this Court; *Held*, that the suit must be remanded to the State Court, with costs, as not removed to this Court according to law.

(Before JOHNSON, J., Southern District of New York, May 7th, 1877.)

JOHNSON, J. This is an application, on the part of the defendant company, to set aside an order, entered on the 3d day of

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April, 1876, that being the first Monday of April in that year, and the first day of the April term of this Court, in the equity rule book, by which it was ordered that the above cause should proceed in this Court in the same manner as if the same had been originally brought in this Court. This order, being taken by the party on his own motion, is operative only in case he was entitled by law to enter it. The action was pending in the Supreme Court of the State of New York, and was of that class which, if it had been originally brought in this Court, would have taken the form of a bill in equity. The steps on which the plaintiff relies to make out his right to remove the cause, and its actual removal, are disclosed in the papers. They consist of the presentation and filing in the Supreme Court of New York, on the 4th day of February, 1876, of a petition for removal, in the form required by the Act of Congress of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) and a proper bond conditioned for entering in this Court, on the first day of its then next session, a copy of the record in such suit, and conforming in other respects to the requirements of the statute. It is only by compliance with the requirement of the condition before mentioned, that this Court becomes possessed of the cause. Now, in this District, the session of the Circuit Court next after the 4th day of February, 1876, commenced upon the last Monday of February, which, in that year, happened on the 28th. It was on the first day of this term that it was necessary for the plaintiff to file the copy of the record, in order to transfer the cause to this Court. The February, April and October terms are the three regular terms of this Court, each of which in succession supersedes the preceding term, differing, in this respect, from the special and exclusive criminal terms, as to which it is provided by law, that they shall not in any way affect the holding of any other term at the same time. (*Rev. Stat.*, sec. 658.) These criminal terms have been held not to be sessions of the Court, within the meaning of the statutes concerning the removal of causes. (*Jones v. Oceanic S. Nav. Co.*, 11 *Blatchf. C. C. R.*, 406.) The order of the 3d of April, 1876, was,

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therefore, irregular and must be set aside, and the cause must be remanded to the Supreme Court of the State of New York, as not removed to this Court according to law, with costs.

Francis Fellowes, John K. Porter and William Barnes,
for the plaintiff.

Francis N. Bangs, for the defendants.

ARCHIBALD H. BULL vs. THE TOWN OF SOUTHFIELD.

The provisions of the Act of the Legislature of New York, passed May 5th, 1870, incorporating the village of Edgewater, Richmond County, are so repugnant to the provisions of the Act of May 11th, 1869, authorizing the issuing of bonds by certain towns, that the town of Southfield, in Richmond County, was excepted from the operation of the Act of 1869, and the Act of 1869 was repealed so far as that town was concerned, and bonds purporting to have been issued by that town under the Act of 1869, after the passage of the Act of 1870, are void, because such bonds were issued without authority of law.

(Before BENEDICT, J., Eastern District of New York, May 16th, 1877.)

BENEDICT, J. This action is brought to recover the amount of several coupons for interest, which have been detached from bonds issued by the supervisor of the town of Southfield, Richmond County, in the year 1871, for the purpose of raising money to be expended in repairing, grading, or macadamizing certain roads and avenues. The liability of the town of Southfield to pay these coupons is denied, upon the ground that the bonds to which they were attached were issued without any authority of law, and are, therefore, void. It is not doubted that the liability of the town depends upon whether the authority to issue such bonds can be found on the statutes of the State, for, without authority derived from law, no town can be charged with such liability by the officers

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thereof. The requisite authority is claimed to be conferred by chapter 855 of the Laws of 1869, and the bonds themselves recite that they are issued under and pursuant to that statute. The question I am thus called on to determine is, not whether certain forms or preliminary proceedings required by law on the part of the town have been duly complied with, but whether, under any circumstances, the authorities of the town of Southfield had, at the time these bonds were issued, legal authority to raise money upon the credit of that town, for the purposes stated in these bonds. The existence of such authority is denied upon several grounds.

One ground is based upon the fact that the bonds, upon their face, declare that the object of their issue was to repair, grade, or macadamize Vanderbilt Avenue, when that Avenue is wholly located in the town of Middleton, and no part of it is within the limits of the town of Southfield.

A second ground is, that the Act of May 5th, 1870, incorporating the village of Edgewater, in effect excepted the town of Southfield from the operation of chapter 855 of the Laws of 1869, and in law worked a repeal of the Act of 1869, so far as the town of Southfield is concerned.

There is no difference of opinion in regard to the principles upon which such questions as these are to be determined. In a case like this, where there has been an advance of money upon the faith of bonds issued by the authorities of the town, and the money has been actually expended by such authority, there are no considerations of equity calling for any stretching of the law, in order to enable the town to avoid payment. Furthermore, the case, in one aspect, turns upon a question of the repeal of a statute by implication, and such repeals are never favored. In this case, if ever, it is the duty of the Court to so construe the two statutes involved in the controversy that both can stand, if such a course is possible. On the other hand, it is not to be forgotten that the protection of the property of the town resides in the statutes enacted for that purpose, and the town has an undoubted right to decline to be bound by any contract not authorized by law to be made in its

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behalf. With these considerations in view, I have examined the second ground of opposition on the part of the town, above stated, and I proceed now to determine whether the provisions of the Act of 1870, incorporating the village of Edgewater, are so inconsistent with and repugnant to the provisions of the Act of 1869, as to require the decision that the town of Southfield is excepted from the operation of the Act of 1869, and that, so far as the town of Southfield is concerned, the Act of 1869 had been repealed when these bonds were issued.

The point has been taken, that the Act of 1869, when enacted, did not apply to the town of Southfield, because of existing laws of special character relating to the village of Edgewater; but, for the purposes of this decision, I shall assume that all the towns and counties in the State were within the scope of the Act of 1869, save only those excepted by the Act itself, viz., New York and Kings. I also assume that the Act of 1869 confers sufficient authority for the issue of these bonds, provided the Act was in force at the time.

The provisions of the Act of 1869, relied on by the plaintiff, are as follows: "Section 1. The boards of supervisors of each county in this State, except New York and Kings, shall have power, at their annual meeting, or at any other regular meeting, to authorize the supervisors of any town in such county, by and with the consent of the commissioners of highways, town clerk and justices of the peace of such town, to borrow such sum of money, for and on the credit of such town, as the said town officers may deem necessary, to build or repair any road or roads, or bridge or bridges, in such town, or which shall be partly in such town and partly in an adjoining town; * * * * and the said board of supervisors shall have power to prescribe the form of obligation to be issued on any such loan, and the time and place of payment; * * * * and it shall be their duty, from time to time, as the said obligations shall become due and payable, to impose upon the taxable property of such town, sufficient tax to pay the said principal and interest of such obligations, according to the terms and conditions thereof." The obvious

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intention of these provisions of law was to authorize the officers of towns, in behalf of the town, to determine upon the building or repairing of any road or street within the town, that they might deem necessary to be built or repaired upon the credit of the town, and to borrow the money needed for such purpose, for the town, on the credit of the town, provided the supervisors of the county should give their sanction to the proceeding. According to the Act, the town authorities named therein must determine the amount of the expenditure to be made and the necessity therefor, and they are to expend the money, when raised, for the town, but they cannot borrow the money upon the credit of the town unless authorized to do so by the supervisors of the county. The power to borrow money, here conferred, plainly is dependent upon the power to determine upon the necessity, amount and manner of the expenditure, and the power is confined to borrowing, upon the credit of the whole town, a sum to be raised by tax upon the taxable property of the whole town. There is no power to borrow for, or to tax, a part of a town. If, then, it be ascertained that, since the passage of the Act of 1869, all jurisdiction over the roads of any part of the town of Southfield has been taken away from the authorities of that town, so that they no longer have power to determine upon the repairing of roads in such part, or to expend money therefor, the conclusion must follow, that, so far as the town of Southfield is concerned, the Act of 1869 no longer confers authority upon the officers of the town to borrow money to be expended on such roads. Turning now to the Act of 1870, which incorporates a village whose limits extend over part of the town of Southfield and over part of the town of Middleton, it is at once seen, that, with regard to the roads and avenues of that part of the town within the limits of the village of Edgewater, the town officers have been deprived of all jurisdiction whatever. Some of the provisions of this statute may here be mentioned, to show how absolutely the power to interfere with the roads in this locality, or to tax the town for their repair, has been taken away from the town officers.

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Thus, section 1, title 9, of the Act provides, that the board of trustees (of the village) shall have the sole control and management of the roads, avenues, streets and public places of the village, and of the construction, drainage, repair and improvement of the same, with sole power, by subdivision 2, to keep the same in good repair, to macadamize the same, to change the grade of, or otherwise improve, the same; by subdivision 4, to direct any sidewalk, upon any street, avenue or highway of said village, to be flagged; and, by subdivision 13, to determine the lines of all roads, avenues, streets and public places of the village. Section 9, of title 15, makes it the duty of the village trustees to cause a topographical survey and map of the village to be made, showing the lines and width of all streets and avenues, and showing and establishing the grades of such streets and avenues, with power to the trustees, "in their discretion, to direct the alteration of any grade." Title 8 provides a street commissioner to be "under the direction of the trustees," who shall determine what action, if any, shall be taken as to any street, avenue or highway in said village. Title 12, section 1, provides that the village trustees shall have power to raise annually, by taxation upon the taxable inhabitants of the village, and the property therein liable to taxation, such sum of money as they shall deem proper to be expended for roads and improvements, with the proviso, that the amount raised in any one year shall not exceed a specified sum, except in certain special cases. By section 7, title 13, the village trustees are required, in each year, at or before the time at which they shall determine the amount of village tax to be levied for that year, to make a formal budget and appropriation of the moneys so to be raised, to the purpose, among others, of "repairs of streets." By section 4, of title 12, all taxes and assessments authorized by the Act are made a first lien upon the lands upon which the same shall be imposed or assessed, and until paid by the owner of the land. The grading and macadamizing of the streets and avenues in this part of the town are, by this Act, classed as improvements, and the Act requires that expenses of this character shall be

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assessed upon and borne by the property benefitted thereby. The power "to cause avenues and streets to be opened, extended, widened, regulated, paved, macadamized, or covered with broken stone," "and, generally to make such other improvements in and about the streets, avenues and public squares of the village, as the public wants and conveniences may require," is conferred upon the village trustees by section 1, of title 10, while section 1, of title 15, provides that "the village shall constitute a separate road district, under the direction and supervision of the trustees of said village, and free from any interference or control by any other officers or persons." The legal effect of these provisions is to declare that the roads and streets in that part of the town of Southfield which lies within the limits of the village of Edgewater, are to be repaired, graded and macadamized when and in such manner as shall be determined on by the trustees of Edgewater, at the expense of the village, and not at the expense of the town, nor can any tax be levied upon the town for such a purpose. It cannot be supposed that the Legislature intended to confer powers like these upon the village trustees, and at the same time permit the same powers to be exercised by the town authorities. Indeed, the Act expressly declares the contrary, when it forbids "any interference or control by any other officers or persons;" and it is evident, from the nature of the powers, that it would be impossible for such powers to be exercised concurrently by the town officers and the village trustees. Furthermore, by title 13, section 3, of the Act of 1870, the power to borrow money upon the credit of the village is limited; and by section 4 the trustees are forbidden to contract any indebtedness, or incur any liability, for the payment of money, in any year, beyond the revenue of that year, except as expressly permitted by the Act itself. These provisions forbid the idea that it was the intention to leave the authorities of the town of Southfield with unlimited authority to impose upon the same locality an unlimited debt for the very same purposes. It seems impossible, therefore, for the Act of 1869 and the Act of 1870 to be operative at the same time, in the

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locality under consideration ; and the conclusion is forced, that the legal effect of the Act of 1870 was to remove the town of Southfield from the operation of the Act of 1869, as effectually as were the counties of New York and Kings, by the express terms of the latter Act.

Under this view of the effect of the Act of 1870, the fact that the trustees of the village of Edgewater consented to the exercise by the town authorities of the authority which they assumed to exercise by virtue of the Act of 1869, when they issued the bonds in question, is wholly immaterial. The consent of the village trustees could not create a power when no such power existed, and the existence of the power has not been claimed, except by virtue of the Act of 1869.

Nor does it avail, that it appears on the face of the bonds that the money raised thereby might be expended on the Richmond road, which is outside the village limits and partly in the town of Southfield. The consideration of the bonds is entire and not separable. The illegal part thereof vitiates the whole ; and, moreover, the bonds disclose their illegality upon their face, for they recite that they are issued in pursuance of chapter 855 of the Laws of 1869, for the purpose of repairing, regulating and macadamizing certain streets, which statute, as has been seen, had ceased to be operative in the town of Southfield, and could confer no power to pledge the credit of that town for the repairing, grading or macadamizing of any street whatever.

Entertaining these views in respect to the effect of the Act of 1870, it is unnecessary for me to pass upon the other grounds taken in behalf of the town, and it becomes my duty to declare the coupons upon which this action is brought to be void, for the reason that the bonds to which they were attached were issued without any authority of law. Judgment must, therefore, be for the defendant.

John A. Foley, for the plaintiff.

George J. Greenfield, for the defendant.

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THE UNITED STATES vs. MARTIN POWER.

It is provided by § 2165 of the Revised Statutes of the United States, that an alien may be admitted to be a citizen of the United States by "a Court of record of any of the States, having common law jurisdiction, and a seal and clerk." A City Court, which is a Court of record and has a seal and a clerk, and has conferred upon it, by a statute of New York, all the power and jurisdiction of justices of the peace, and all jurisdiction and power, within the city, of the Marine Court in the city of New York, and whose judge is clothed with all the powers of a county judge and of a judge of the Supreme Court of the State at chambers, and which has civil jurisdiction in all actions for the recovery of money, when the amount recovered does not exceed \$1,000, is a Court having common law jurisdiction, within the meaning of said § 2165.

(Before BENEDICT, J., Southern District of New York, May 16th, 1877.)

BENEDICT, J. The prisoner is indicted under § 2165 of the Revised Statutes of the United States, for perjury committed by him in making an application to be naturalized before the City Court of Yonkers. A demurrer to this indictment brings before the Court the question, whether the City Court of Yonkers had jurisdiction to entertain the prisoner's application to be made a citizen of the United States. If that Court has not such jurisdiction, the indictment charges no offence, and the prisoner must be discharged.

The provision in the laws of the United States, upon this subject, is to be found in § 2165 of the Revised Statutes, where it is enacted, that an alien may be admitted to become a citizen of the United States, upon making certain declarations on oath before "a Court of record of any of the States, having common-law jurisdiction, and a seal and clerk." It is conceded, that the City Court of Yonkers is a Court of record, and that it has a clerk and a seal, but the question is, whether it is a Court having common law jurisdiction, within the meaning of the statute of the United States, above quoted. The jurisdiction of the City Court of Yonkers is to be found in the Laws of the State of New York. Chapter 866 of the Laws of 1872 confers upon that Court all the power and

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jurisdiction of justices of the peace, and all jurisdiction and power, within the city of Yonkers, of the Marine Court in the city of New York, and it clothes the judge of that Court with all the powers of a county judge and of a judge of the Supreme Court of the State at chambers. In addition to these powers, chapter 61 of the Laws of 1873 confers upon this Court civil jurisdiction in all actions for the recovery of money, when the amount recovered does not exceed \$1,000. It is manifest, that, by virtue of these statutory provisions, the City Court of Yonkers is authorized to exercise some common-law jurisdiction, that is, it has jurisdiction to hear and determine causes which were cognizable by the Courts of law, under what is known as the common law of England, although it has not jurisdiction of all such causes. It will be noticed, however, that the statute of the United States does not require of Courts authorized to entertain applications for naturalization, that they shall have all the jurisdiction possessed by any Court of law. If the Court may exercise any part of that jurisdiction, it is within the language of the statute, and within its meaning, as well. Thus, the Courts of Massachusetts, in *Ex-parte Gladhill*, (8 *Metcalf*, 168,) held the Police Court of Lowell to be a Court exercising a common law jurisdiction, and, therefore, authorized to entertain applications to be made citizens of the United States, because it was by law authorized to "hear and determine all complaints and prosecutions, in like manner as justices of the peace," with "jurisdiction of all civil suits and actions cognizable by a justice of the peace." The reasoning of this decision was adopted by the Circuit Court of the United States for the first Circuit, in *Ex parte Cregg*, (2 *Curtis*, 98,) where, upon the same ground, the Police Court of Lynn was held, by the Circuit Court of the United States, to be a Court having common-law jurisdiction, within the meaning of the United States statute. A like conclusion was reached by the Supreme Court of New Hampshire, in respect to the Police Court of Nashua, and upon the same ground. (*State v. Whittemore*, 50 *N. H.*, 245.) In *In re Conner*, (39 *Cal.*, 98,) a similar question in respect to the

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County Courts of California was considered, and it was there adjudged, that a Court having jurisdiction to prevent or abate a nuisance was a Court exercising common law jurisdiction, within the meaning of this statute of the United States. The Court, in the case, say it is not necessary to have "jurisdiction over all classes of common law actions," and that "the Act of Congress does not require that the Courts shall have *all* the common law jurisdiction which pertains to *all* classes of cases." See, also, the meaning given by the Supreme Court of the United States to the words "common law," as used in the Constitution of the United States. (*Parsons v. Bedford*, 3 Pet., 433, 446.)

In the light of these decisions there seems to be no reason for doubting that the language of the statute is sufficiently broad to permit the City Court of Yonkers to hear and determine the prisoner's application to be made a citizen of the United States. This is the only question that has been presented for my consideration, and, entertaining the opinion above expressed, I must overrule the demurrer, and direct the prisoner to plead to the indictment.

William Burke Cochran, for the defendant.

Benjamin B. Foster, (*Assistant District Attorney*), for the United States.

THE ALICE TAINTER.

Where a note of issue, on an appeal in Admiralty, is delivered to the clerk, under Rule 55 of this Court, with a view to his putting the cause on the calendar of causes to be tried, for a particular term, a fee of \$1 to the clerk for the service is a lawful and proper fee, and, if paid by a successful party, can be taxed against his adversary, as costs in the cause.

It is proper for the clerk to charge for including the evidence, in a suit in

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Admiralty, in the final record, on final decree, notwithstanding the provision of § 1 of the Act of February 16th, 1875, (18 *U. S. Stat. at Large*, 315,) in regard to appeals in Admiralty to the Supreme Court.

(Before BLATCHFORD, J., Southern District of New York, May 18th, 1877.)

- BLATCHFORD, J. Rule 55 of this Court provides as follows: "When a cause is noticed for trial or argument for the first day of the term, a notice thereof, with a note of the issue, and of the pleadings, and of the attorneys' names, shall be delivered to the clerk at least eight days next preceding the term, and the clerk shall, as early as the following Thursday, have the calendar of causes to be tried, made up, arranging them according to the dates of their issues; and no cause shall be put upon the calendar, without the special order of the Court, unless the note of issue shall be furnished as is hereby required." A rule like this, in substance, has been in force since 1838. Such rule was made under the authority contained in section 7 of the Act of March 2d, 1793, (1 *U. S. Stat. at Large*, 335.) which provides, that "it shall be lawful for the several Courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective Courts, directing the returning of writs * * * and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said Courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." This enactment is embodied in section 918 of the Revised Statutes, which provides, that "the several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court" under section 917, "make rules and orders directing the returning of writs * * * and otherwise regulate their own practice, as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." The practice of making up, for the use of the Court, a calendar of causes, from time to time, sometimes every term, sometimes not so often, such calendar to be com-

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posed only of causes specified in notes of issue delivered to the clerk of the Court by one or the other or both of the parties to the cause, and of confining the action of the Court, in trying and hearing causes, to the causes which are upon such calendar, is a practice which has always existed in the State Courts of New York, of all grades; while, in some of the States, such practice is unknown, but the clerk of the Court makes up a trial list from his own scrutiny of the papers on file. In the Courts of New York, and in the Federal Courts in New York, the payment of a fee to the clerk, on the delivery to him of the note of issue, has always been required.

In the present case, on an appeal in Admiralty from the District Court, the libel was dismissed, with costs, by this Court. In taxing the costs the clerk allowed and taxed the following item: "8 notes of issue, \$8 00." The cause was upon the calendar each one of eight terms, and, on each one of the eight occasions, the claimant delivered to the clerk a note of the issue and paid him the sum of \$1. It is contended, for the libellant, that this charge of \$1 on each occasion is unlawful, unless it is found to be specifically provided for in section 828 of the Revised Statutes; that the only provision on the subject in § 828 is this one: "for making dockets and taxing costs, in cases removed by writ of error or appeal, one dollar;" and that, under this provision, there can be but one charge of one dollar.

It is to be noted, that the rule does not require that the note of issue shall be filed in the Court or with the clerk, or shall become part of the files of the Court. It is only to be delivered to the clerk for his use in making up the calendar. The clerk makes the calendar for the convenience of the Court, and a copy of it is always made for the use of the bar. The service is not one which it is contemplated by section 828 that the clerk shall perform, and it is not covered by any item in that section, nor does any fee prescribed in that section apply to it. In the rule, it might as well have been provided that the marshal or a commissioner should perform the service, as the clerk. It is not reasonable that the service should be performed

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without compensation. As it is for the benefit of suitors, it is reasonable that suitors should pay for it. It is as reasonable that they should pay for it as it is that they should pay the expense of printing papers which the Court requires to be printed. It is for the Court to say who shall ultimately pay such expenses; and the Court has the power to say that the losing party shall ultimately pay them, by refunding them to the party who pays them in the first instance. Whether they are paid in the first instance to a printer or to any other person who is designated by the Court to perform the particular service, is immaterial. In *Neff v. Pennoyer*, (3 *Sawyer*, 335,) the Circuit Court for the District of Oregon held, that, under § 918 of the Revised Statutes, that Court had the right, either by general rule or by special order in a particular case, to require parties to a cause submitted to it for decision to file printed briefs, and to tax the reasonable expense of printing the brief of the prevailing party against the losing party, as a necessary disbursement. Under the same authority, this Court made a rule, on the 1st of July, 1876, requiring the cases and points and all other papers in certain calendar causes to be printed, and providing that a party recovering costs should be allowed his disbursements for the printing required of him by such rule. A like practice and rule as to printing papers exists in the Circuit Court for the District of Massachusetts. (See *Jordan v. Agawam Woolen Co.*, 3 *Clifford*, 239.)

The remaining question is, as to whether the charge of \$1 for the service is a reasonable one. It has for many years been the standard charge for the service in both of the Federal Courts for this District. It has not, it is believed, until now, been ever questioned. In the years 1852 and 1853, as appears from the records of this Court, the usual charge for the same service, paid without question, was \$4 75. The charge of \$1 seems reasonable, in view of the nature of the service, and of the fees allowed in § 828. Long acquiescence by the Court and the bar go far to establish that the fee is a reasonable one.

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As to the clerk's costs on final decree, no objection is made to any specific item, although the items are stated in detail by the clerk, except to the charge for making the final record, which, it is contended, ought not to include the evidence in the cause, because, by § 1 of the Act of February 16th, 1875, (18 *U. S. Stat. at Large*, 315,) the review, by the Supreme Court, on an appeal in Admiralty, is limited to a determination of the questions of law arising on the record, and the Circuit Court is required to make a finding of facts, as part of the record. But, Rule 52 in Admiralty, prescribed by the Supreme Court, requires that the record transmitted to the Circuit Court, on an appeal, by the clerk of the District Court, shall contain, among other things, the testimony on both sides. The record so transmitted to the Circuit Court becomes part of the record of the cause in that Court, and, if there be an appeal to the Supreme Court, such record must, as a whole, be transmitted to that Court. There is nothing in the Act of 1875 which varies this practice.

The question as to the copy of the apostles has been heretofore disposed of.

The taxation is affirmed.

Beebe, Wilcox & Hobbs, for the libellant.

Scudder & Carter, for the claimant.

THE UNITED STATES

vs.

HANNAH T. LAWRENCE, AS ADMINISTRATRIX, & CO., GEORGE B.
MICKLE AND WILLIAM D. MCGREGOR.

A bond to the United States, signed and sealed by W., G., C. and M., and acknowledged by each as his act, recited that W. and G., composing the firm

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of A. & Sons, as principal, and C. and M., as sureties, were held, &c., jointly and severally, to the United States, in the sum of \$9,000, and was conditioned that the firm of A. & Sons should pay all taxes assessed upon tobacco manufactured by the firm. W. and C. died, and H. was appointed administratrix of W. The United States then brought suit on the bond against H., as administratrix of W., and G. and M., claiming a judgment for \$9,000. On demurrer to the complaint, by H.: *Held*,

- (1.) That, as the complaint set forth a several obligation by the obligors, it was good, because, by the law of New York, a several liability could be enforced, in one suit, against all the defendants;
- (2.) That this was so, although H. was sued as administratrix, and the others as individuals;
- (3.) That the bond was not the obligation of the firm, and that, therefore, it was not necessary to exhaust all remedies against G., as surviving partner of the firm, before suing on the bond.

(Before BENEDICT, J., Eastern District of New York, May 28d, 1877.)

BENEDICT, J. This cause comes before the Court upon a demurrer to the complaint. The allegations of the complaint are, that, on the 25th of January, 1867, William E. Lawrence, George B. Mickle, Charles Vandervoort and William D. McGregor executed a bond, whereby they bound themselves, jointly and severally, unto the United States, in the sum of \$9,000, upon condition that, if the firm of A. H. Mickle & Sons, of which firm the said Lawrence and the said Mickle were partners, should pay all taxes assessed upon tobacco, snuff or cigars manufactured by the firm, the said bond should be void. A breach of the condition of the bond is then correctly stated, and the complaint then proceeds to aver the death of Charles Vandervoort, one of the obligors, and also the death of William E. Lawrence, another of the obligors; and that the defendant Hannah T. Lawrence was thereafter, and before the commencement of this action, duly appointed administratrix, with the will annexed, of the goods and chattels which were of the said William E. Lawrence, deceased, wherefore judgment is prayed against the defendants in the sum of \$9,000.

To this complaint the defendant Hannah T. Lawrence demurs, and contends, first, that the plaintiff has, in this action, elected to treat the bond in suit as a joint obligation, and

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that, as such, it was discharged by the death of Lawrence. But, the complaint sets forth a several obligation on the part of the obligors. It cannot, therefore, be said that the plaintiff has elected to treat the liability as joint, and, if a several liability can be enforced against the defendants, in this action, the complaint is good. The Code of Procedure of the State of New York (§ 120) provides, that persons severally liable upon the same obligation or instrument may, all or any of them, be included in the same action. This provision of the law of the State must be considered as the law for this Court, (*Sawin v. Kenny*, 3 Otto, 289; see, also, *Chemung Canal Bank v. Lowery*, 3 Otto, 72;) and by virtue thereof an action against all the obligors upon a bond like this can be maintained. By a further provision of the law of the State, (2 R. S., 113, § 2,) all actions upon contract may be maintained by and against executors, in all cases in which the same might have been maintained by or against their respective testators; and, by a still further provision of the same law, (*Id.*, § 3,) administrators are accountable to others to whom the estate was holden or bound, in the same manner as executors. The liability of the defendant Lawrence, as administratrix, to be sued upon this bond, is determined by those provisions of law.

The remaining question is, whether an action will lie, in the Courts of the United States, against several defendants, upon a several liability arising out of the same instrument, where the defendants are sued in different characters, and the judgment, although the same in amount, must be otherwise different, as here, where one of the defendants is sued as administratrix. This question, also, must be determined according to the law of the State, and, by the laws of the State, such an action is permitted. (*Churchill v. Trapp*, 3 Abb. Pr. Rep., 306.)

A further point has been suggested, not arising upon the face of the complaint, but which, as it has been discussed by counsel with reference to the terms of the bond, and the bond itself has been, by consent, submitted for consideration, may

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here be disposed of. The point is this, that the bond sued on is the obligation of the firm of A. H. Mickle & Sons, and no action upon a partnership liability can be maintained against the representative of a deceased partner, without first exhausting the remedy against the surviving partner. No doubt exists, that, if this bond be the bond of the firm, it is impossible to maintain the action without averring in the complaint that Mickle, the surviving partner, is insolvent, and that all remedies against him have been exhausted. But the bond is not the bond of a firm. No firm name is attached to it, only the names of several persons. The fact that some of those persons were members of a firm does not alter the nature of the obligation nor create a liability on the part of the firm. The recital of the bond is, "We, William E. Lawrence and George B. Mickle, composing the firm of A. H. Mickle & Sons, as principal, and Charles Vandervoort and William D. McGregor, as sureties, are held," &c.; and this recital is relied on as conclusive to show that the obligation is that of the firm of A. H. Mickle & Sons, but I do not think the recital can control. The bond is executed by four different persons, each of whom has attached his seal and each of whom acknowledged the execution thereof, as his act. Each of these persons, by executing this bond, assumed a personal obligation to the United States, which can be enforced against him personally, notwithstanding the fact that the bond was given in the interest of the firm and to secure taxes that the firm might become liable for.

The demurrer is, therefore, overruled, with leave to plead, on payment of costs.

Asa W. Tenney, (District Attorney,) for the plaintiffs.

George W. Denton, for the defendant Lawrence.

The Providence County Savings Bank v. Frost.

THE PROVIDENCE COUNTY SAVINGS BANK AND OTHERS

vs.

JONATHAN F. FROST AND OTHERS. IN EQUITY.

A promissory note was signed by its maker in New York and transmitted by him to Rhode Island, to be discounted in that State. It was there discounted, and it had no inception as an obligation to pay until it was so discounted: *Held*, that the contract of the maker was made in Rhode Island, and that its legality or illegality, on the question of usury, was to be determined by the law of Rhode Island, and not by that of New York.

The decision in *Providence Co. Savings Bank v. Frost*, (8 *Benedict*, 293,) affirmed.

(Before JOHNSON, J., Southern District of New York, May 23d, 1877.)

JOHNSON, J. This is an appeal in equity from a decree of the District Court in favor of the complainants. That decree, in my judgment, is correct, both upon the facts involved and upon the law of the case. The defence is founded upon an alleged violation of the laws of New York against usury, and no other claim of illegality is made. The allegations of the answer show, that, though the notes in question were signed by their maker in New York, yet they were transmitted by him to Rhode Island, in order that their discount might be procured in that State. That they were so discounted, and that they had no inception as obligations to pay until that event, is entirely obvious, on the statement of the defendant Frost's answer, as well as upon the testimony. I concur entirely in the opinion of Judge Blatchford, (8 *Benedict*, 293,) upon the question of illegality, as dependent on the laws of New York against usury. On that subject the law of New York did not govern the contract. It was made in Rhode Island, and its legality or illegality is to be determined by the law of that State. On that subject, *Tilden v. Blair*, (21 *Wallace*, 241,) *Andrews v. Pond*, (13 *Peters*, 65, 77 to 80,) and *Cockle v. Flack*, (3 *Otto*, 344, 347,) seem to be conclusive that such is the

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law of the Courts of the United States. The decree must be affirmed, with costs.

Francis N. Bangs, for the plaintiffs.

Elliott F. Shepard, for the defendants.

GEORGE E. TERRY, RECEIVER, &C., vs. LEOPOLD BAMBERGER.

The B. Co., of Connecticut, had in the hands of C., in New York, goods for sale on commission, on which C. had a lien as security for his liability on accommodation acceptances which he had given to the B. Co. A voluntary assignment in insolvency was made by C. to B., under the laws of New York. B. took possession of such goods, with notice that they belonged to the B. Co. Afterward the B. Co. tendered the acceptances to B., and demanded the goods, but B. refused to deliver them, and sold them. Their market value was \$7,500. Subsequently T. was appointed receiver of the B. Co., under the laws of Connecticut, and tendered the acceptances to B., and demanded the goods, but B. refused to deliver them. T. then sued B. in this Court, and, at the trial, was allowed to amend his declaration by adding counts for a conversion prior to T.'s appointment: *Held*,

- (1.) B. rightfully took possession of the goods of the B. Co., but tortiously converted them thereafter;
- (2.) T., as receiver, had a right to sue B. in Connecticut for a conversion happening prior to T.'s appointment;
- (3.) T. was entitled to a judgment for \$7,500, and interest at 6 *per cent.* from the date of the demand by the B. Co., and the costs after the amendment, but should pay to B. his costs until the amendment.

(Before SHIPMAN, J., Connecticut, May 24th, 1877.)

SHIPMAN, J. This case was tried by the Court, the parties having, by written stipulation duly signed, waived a jury. Upon said trial by the Court, both parties appeared by their counsel and with their witnesses, and were fully heard respecting the controverted questions of law and of fact. The facts which are found to have been proved are as follows: On or about August 12th, 1875, the firm of S. A. Castle & Co., of the city of New York, consisting of Samuel A. Castle,

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Rufus E. Hitchcock, and Henry S. McGrane, being insolvent, made an assignment in insolvency of all their goods and effects, for the joint and equal benefit of their creditors, under the statute of New York, of April 13th, 1860, to Leopold Bamberger, of said city, who accepted said trust, gave bonds according to law, and entered upon his duties on August 12th, 1875. Previous to this time, said firm had been the selling agents, in said city, of the United States Button Company, a joint stock corporation, duly incorporated in pursuance of the laws of this State, and established at Waterbury. Said firm had in their store, on said August 12th, 1875, the manufactured goods of said company, which had been theretofore sent to them for sale upon commission, to a large amount, which goods were the property of said Button Company. The market value of said goods was \$7,500. The company had not been in the habit of drawing against their consignments, but, prior to this date, had obtained from S. A. Castle & Co. their accommodation acceptances, to the amount of \$22,500, and it was agreed between said parties, at the time when said acceptances were given, that said firm should have a lien on the goods which were from time to time unsold, as security against their liability upon said acceptances. These acceptances had been discounted for the benefit of said Button Company, and were then held and owned by the Waterbury National Bank. The goods of said company in the possession of S. A. Castle & Co. were specified in their inventory, which was duly made and filed in pursuance of the laws of the State of New York, under the head of "goods on hand on which allowances have been made and merchandize in stock, &c.," as "consigned by the United States Button Co.," and were appraised at \$6,054. The assignee thus had notice of the ownership of the goods. Said Bamberger immediately took possession of said goods as his own, and as equitably belonging to the creditors of S. A. Castle & Co., and proceeded forthwith to sell them as rapidly as he was able, for the benefit of said estate. On September 24th, 1875, said Button Company took up and received said acceptances from the Waterbury National

Bank, by the substitution of the Button Company's notes therefor, and thereupon the president of said company carried said acceptances to New York, tendered them to said Bamberger, and demanded of him the goods belonging to said company, but said Bamberger refused to deliver the same and continued the sale thereof. On or about November 1st, 1875, the plaintiff was duly appointed receiver of the estate of said Button Company, by the Superior Court of New Haven, Connecticut, under and by virtue of the 23d section of chapter 1, title 17, of the General Statutes of Connecticut, (*Revision of 1875, page 281,*) and said receiver was authorized by the decree of said Court to execute the powers specified in the 1st section of part 14, chapter 17, title 19, of said General Statutes, (*Revision of 1875, page 482.*) The plaintiff accepted said trust, gave bonds pursuant to law, which were accepted by said Court, and entered upon his duties. On November 24th, 1875, the plaintiff, accompanied by the secretary of said company as a witness, again tendered to said Bamberger, in the city of New York, said acceptances, and again demanded said goods, as the property of said Button Company, but said Bamberger refused to deliver them. The plaintiff then asked Bamberger if there were any other acceptances outstanding against said goods, or if there were any other claims or charges against the goods, for interest, commissions, &c., except the tendered drafts, to which inquiry Bamberger replied in the negative. Upon the payment of said accommodation acceptances, S. A. Castle & Co. were indebted to said Button Company in a large amount, as appeared by said inventory. The present action was brought in a State Court of this State, and was removed to this Court by the defendant. At the close of the testimony the plaintiff asked and obtained leave, against the objection of the defendant, to amend the declaration by the addition of the second and third counts, for a conversion prior to the plaintiff's appointment. Opportunity was given to the defendant, after the allowance of said amendment, to introduce additional testimony, if he desired.

Upon the foregoing facts, the conclusions of law are as follows:

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1. The defendant rightfully took possession of the goods of the Button Company, but tortiously converted them thereafter. S. A. Castle & Co. were the factors of the Button Company, and, as such, were personally intrusted with the sale of its goods. This trust was a personal one, and could not be delegated to another, beyond the usual course of business, without the consent of the consignors. Neither had Castle & Co. any right to sell or transfer the goods in payment or in pledge for their own indebtedness. Having a lien upon the goods as security for their liability upon the accommodation acceptances which they had given to the consignors, Castle & Co. had a right to transfer said lien to their creditors, and to deliver the goods to their assignee for the benefit of their creditors, solely as a security to the extent of said lien. The Button Company could not regain possession until they had tendered to the assignee the amount of the lien of Castle & Co., or otherwise discharged said lien, and, upon such tender or discharge, had the right to regain possession of their property, if it could be traced, or distinguished from the mass of the other property of the factor in the possession of the assignee. (*Warner v. Martin*, 11 *Howard*, 209; *Veil v. Mitchel*, 4 *Wash. C. C. R.*, 105; *Thompson v. Perkins*, 3 *Mason*, 232; *Cook v. Kelly*, 9 *Bosw.* 358; *Mfg. Co. v. Dehon*, 5 *Pick.*, 7; *Denston v. Perkins*, 2 *Pick.*, 86; *Scott v. Surman*, *Willes R.*, 400.) But, the rightful possession of the assignee gave him no authority to assume to himself the entire property or right of disposing of the goods, until duly authorized by law, and when, having taken possession, with notice that the goods were the property of the Button Company, he proceeded to sell and convert them into money as rapidly as he could, there was a conversion. The action of trover "always supposes the defendant to have come legally into possession of the goods. It is the breach of the trust, or the abuse of such lawful possession, which constitutes the conversion." (*Murray v. Burling*, 10 *Johns.*, 172; *Connah v. Hale*, 23 *Wend.*, 462; *Fisk v. Ewen*, 46 *N. Hamp.*, 173; *Baldwin v. Cole*, 6 *Mod.*, 212; *M'Combie v. Davies*, 6 *East*, 538.)

2. The plaintiff, as receiver, had a right to institute a suit in this State against the defendant, for a conversion happening prior to the plaintiff's appointment. It is contended, that the decree of the State Court had no extra-territorial jurisdiction, and gave the plaintiff no title to property beyond the limits of this State, and that, therefore, he had no right to institute a suit for the recovery of the value of property which had been since his appointment beyond the jurisdiction of this State. But, the statutes of this State in regard to the appointment and duties of receivers of the property of corporations do not undertake to change the title of the property or to vest it in the receiver. Receivers are declared by the statute to have the right to the possession of the property of the corporation, and power in their own names, or in its name, to commence and prosecute suits for and on behalf of the corporation, to demand and receive all evidences of debt and property belonging to it, and to do and execute, in its name or their own names, as such receivers, all the acts and things which shall be necessary or proper in the execution of their trust, and to have all the powers, for any of said purposes, possessed by such corporation. The receiver is the agent of the law to collect the property of the corporation and to wind up its affairs, and for that purpose to do all acts which may be necessary in the execution of the trust. By authority of law he acts in the place of the directors, but no title to property is changed. Such has been the construction of similar statutes elsewhere. (*Wil-link v. Morris Canal & Banking Co.*, 3 Green, Ch., 377.)

It is unnecessary to determine whether the receiver was empowered to commence a suit in his own name, in the State of New York, for the recovery of the property of the corporation. As the title to the property which is now in question was confessedly always in the Button Company, a suit could have been instituted in New York against the defendant, in the name of the corporation, certainly with the assent of its officers. It is apparent, that, both before and after the appointment of the plaintiff, the officers of the corporation were seeking to obtain this property, and they have not been pre-

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vented from aiding the receiver in the collection of the debts of the company in any Court here or elsewhere. They are still the officers of the company. In this State, the plaintiff can commence a suit either in the name of the corporation, or in his own name, in its behalf. Whether the receiver or the corporation is plaintiff, the action is for the recovery of the value of property the title of which is in this company. Being thus the agent of the law to wind up the affairs of the corporation, and to do whatever it could do in this behalf, the receiver is authorized to collect, within this State, its debts and choses in action, of whatever nature the same may be, and to commence any proper suits, whether sounding in tort or in contract. "There is no greater reason for allowing the receiver to recover damages in his own name for the breach of a contract made with the bank, than there is for allowing him to recover damages in his own name for the wrongful withholding of the property of the bank, in another form." (*Gillett v. Fairchild*, 4 *Denio*, 80.)

The fact that the United States Button Company had not discharged the lien, and so were not entitled to the possession of the goods, at the time of the conversion by the defendant, on August 12th, 1875, does not defeat the action of trover, the lien having been discharged before suit was brought. If the plaintiff had a right of action when the suit commenced, it is competent for him to show a prior conversion. (*Delano v. Curtis*, 7 *Allen*, 470; *Carpenter v. Hale*, 8 *Gray*, 157.) Judgment should be rendered in favor of the plaintiff, for \$7,500 and interest at six per cent. from September 24th, 1875, and his costs accruing after May 15th, 1877. Upon the amendment, the plaintiff should pay the defendant his taxable costs until May 15th, 1877, in accordance with the State practice. (*Richardson v. Hine*, 43 *Conn.*, 201.)

George E. Terry and Stephen W. Kellogg, for the plaintiff.

Charles W. Gillette and Harris B. Munson, for the defendant.

In re Simeon Leland and others, Bankrupts.

IN THE MATTER OF SIMEON LE LAND AND OTHERS, BANKRUPTS.

A determination by the District Court, in a bankruptcy proceeding, to which a creditor was a party, that such creditor had received a fraudulent preference, and that, in consequence thereof, he was disabled to prove any part of his debt, is an adjudication which debars him from subsequently proving his debt and authorizes the District Court to expunge his claim, when proved.

(Before JOHNSON, J., Southern District of New York, May 25th, 1877.)

JOHNSON, J. These are statutory appeals from the decision of the District Court, expunging two claims against the estate of the bankrupts. A jury trial was waived in each case, and they were tried before me, in part upon written stipulations as to the facts, and are now to be considered upon the substantial question whether the parties claimant are not concluded by certain proceedings in the District Court, in which a determination of that Court was had that the claimants had received a fraudulent preference, and that, in consequence thereof, they were disabled to prove as creditors against the bankrupts, for any part of their debts. The proceeding from which the present appeals are taken, was the ordinary proceeding by a creditor to prove his debt in bankruptcy, and the appeals were taken from orders or decisions of the District Court against the creditors' claims. But these decisions are vacated by the appeals, and go for nothing against the creditors. The ground of the decisions is, however, not vacated, but may be availed of on this trial, in opposition to the creditors' claims, in so far as by law it is in its nature available. Now, a prior adjudication is always available against the defeated party, when made in a competent jurisdiction, and upon a controversy actually decided in that adjudication. If, in a suit in a justice's Court, the matter had come to be in judgment between these parties, the defeated party would have been bound everywhere, and could never have been permitted to litigate the point anew. The prin-

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ciple is very familiar, and I refer to the case of *White v. Coatsworth*, (6 N. Y., 137,) only as a striking illustration of its universality. There, a verdict in summary proceedings, to recover the possession of demised premises, finding no rent due, was held conclusive against the landlord, in a subsequent action. The principle was thus stated by the Court: "The judgment of a Court of competent jurisdiction, upon a point litigated between the parties, is conclusive in all subsequent controversies, where the same matter comes again directly in question." The question then is—was there such an adjudication applicable to the case now on trial? I think it undeniable that such an adjudication did take place. The parties might probably have insisted that the matters in question could only be judicially determined in a plenary suit; but they did not take this ground, and, on the contrary, submitted the whole matter to the decision of the District Court, which, by its decree, entered November 1st, 1873, adjudged the claims of the now plaintiffs to be affected by the preferential securities therein referred to, and, upon that ground, debarred them from any participation in the distribution of the fund then being administered. At the hearing of that application the parties now concerned appeared by their counsel, and, in open Court, waived all objections to the form of the proceeding, and submitted all the questions involved therein to the decision and decree of the Court. The general question which the Court was then dealing with, was the distribution of a fund derived from the sale of property which had belonged to the bankrupts, and, as a necessary part of the inquiry, the Court was compelled to consider whether the securities charged upon that property, and which those creditors had received, were preferential, and, so, void. The Court adjudged the securities preferential, and declared that the creditors who had taken them, including the plaintiffs in these suits, were parties to the preferential purpose, and decreed them to be debarred from any lien upon the fund in question. This adjudication stands in force at this day, and cannot be deprived of its effect upon the rights of these parties. It cannot come in

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question in the pending suits. They do not bring up the merits of that decision for re-examination in any way. The facts established in that litigation bring the cases of these plaintiffs within the scope of the provision of the bankrupt law which debars the proof of a debt in respect to which a preference has been received, when the assignee has recovered back the property. Upon this part of the case I refer to and adopt the opinions of Judge Blatchford, in respect to the claims of these creditors, as pronounced and reported in *re Leland*, (7 *Benedict*, 156 and 436.) The questions involved are there amply discussed, and I see no advantage to the parties or to the law in going over the same ground and reiterating the same views. Upon all these points the evidence produced by the defendant is not only admissible, but, as it seems to me, also conclusive against the plaintiffs. Under the arrangement at the trial, I do not now proceed to give judgment in the cases.

Henry E. Davies, for the creditors.

Thomas M. North, for the assignee in bankruptcy.

THE NATIONAL BANK OF THE REPUBLIC

vs.

THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY.

H., having a promissory note made by B., wrongfully diverted it and transferred it to N., as collateral security for a precedent debt due by H. to N., who took it in good faith: *Held*, that N. could not be affected by any equities between B. and H.

N. sued an endorser of the note in a State Court, and was defeated, on the ground that the law, as held by the State Court, was, that N., having taken the note as security for a precedent debt, took it subject to the equities between the prior parties. Afterwards N. sued the maker on the same note:

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Held, that the judgment in the suit against the endorser was not a bar in favor of the maker.

(Before WALLACE, J., Southern District of New York, May 26th 1877.)

WALLACE, J. The diversion of the note in suit by Hutchinson & Ingersoll cannot avail the defendants, the makers, because, within the authority of *Swift v. Tyson*, (16 Peters, 1,) the plaintiff, having taken the note in good faith from Hutchinson & Ingersoll, though only as collateral to a pre-existing debt of the latter, cannot be affected by the equities between the antecedent parties. It is useless to review or discuss the numerous cases which hold that, where a note is thus taken as security, and there is no agreement, express or implied from the circumstances, that the creditor is to forbear or extend the loan, he is not a holder for a valuable consideration, and cannot recover against the maker, when the note has been fraudulently put in circulation or diverted. It suffices to say, that this is the conclusion reached in nearly all the cases in England and in this country where the question has arisen, and is in accord with the doctrine of Courts of equity, that he who does not part with some new consideration, or assume some new obligation, is not a purchaser for a valuable consideration, and has no better rights than the party from whom he purchases. Text writers and commentators of very respectable authority have expressed the opinion that no new agreement between the creditor and the party transferring the paper is essential, for the reason that, if such an agreement is not implied, at least there follows a remission of that vigilance which might otherwise have secured satisfaction of the debt, and because the acceptance of the security imposes new obligations on the part of the creditor toward the debtor. (*Daniel on Neg. Ins'ts*, § 829; *Byles on Bills*, 125, note by Judge Sharnwood.) Whether this reasoning is satisfactory or not I shall not now stop to inquire. The case of *Swift v. Tyson* was one where the bill was taken in payment of a note held by the plaintiff against the person who transferred the bill, but no weight was placed upon the fact that plaintiff accepted the note in payment and thus satisfied the original debt; and it

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has been generally accepted as committing the Supreme Court to the broad proposition, that the mere acceptance of negotiable paper as security entitled the holder to all the rights of a purchaser for a valuable consideration. (*McBride v. Farmers' Bank*, 26 N. Y., 450; *Atkinson v. Brooks*, 26 Verm., 569; *Allaire v. Hartshorne*, 1 Zabriskie, 665; *Gibson v. Conner*, 3 Georgia, 47; *Fellows v. Harris*, 12 Sm. & M., 462; *Blanchard v. Stevens*, 3 Cush., 162.) Until a more decisive expression from that tribunal, I must yield to the accepted import of that decision, and hold adversely to the position of the defendant.

It is insisted for the defendant, that the judgment recovered in the suit brought by the plaintiff against the endorsers of the note in suit is a bar to this action against the maker. That suit was brought in the State Court, and decided, not upon any defence peculiar to the endorsers, but in accordance with the rule as held in this State, by which the holder of a note, who has taken it as security for a precedent debt, takes it subject to the equities existing between the prior parties. The simple question, then, is whether a judgment in favor of an endorser, in an action by the holder of the note, is an estoppel in an action brought against the maker, where the defence is upon ground common to both the maker and endorser. It would hardly be contended that a judgment in favor of the creditor against the principal would estop a surety from contesting the same issue when sued by the creditor; and it has been decided, in several cases, that a judgment in favor of the principal, when sued by the creditor, will not preclude a subsequent recovery by the creditor against the surety. (*Townsend v. Riddle*, 2 New Hamp., 448; *Bank of the State v. Robinson*, 8 English, 214; *Barker v. Cassidy*, 16 Barb., 177.) Where there is no agreement, express or implied from the nature of the contract, that a surety shall be bound by a suit against the principal, the surety is not affected by the result. He is in the position of a stranger to the controversy. If the surety is not precluded by a judgment against the principal, the creditor is not, because estoppel must equally affect both

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parties. I entertain no doubt that the former suit is not a bar. To the extent its payment operated as a satisfaction of the plaintiff's debt, the defendant is entitled to be relieved. It has no other effect.

The plaintiff is entitled to judgment for the amount of the debt unpaid, for which the note in suit was taken as collateral.

Rodman & Adams, for the plaintiff.

Field & Deyo, for the defendant.

IN THE MATTER OF A. ORLANDO JACKSON, ON HABEAS CORPUS.

The provisions of § 3894 of the Revised Statutes, as amended by § 2 of the Act of July 12th, 1876, (19 *U. S. Stat. at Large*, 90,) prohibit the carrying in the mail of letters or circulars concerning lotteries, and punish as a crime the offence of knowingly depositing or sending anything to be conveyed by mail, in violation of said § 3894, and apply to sealed letters, and are not unconstitutional or invalid.*

A grant of power in the Constitution is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the Constitution was adopted.

Although the only punishment prescribed by § 3894 is a fine, a person who violates the statute may be arrested for trial and imprisoned or bailed.

(Before BLATCHFORD, J., Southern District of New York, June 9th, 1877.)

BLATCHFORD, J. On the 8th of March, 1877, a United States Commissioner for this District issued a warrant to the marshal, which recited, that complaint on oath had been made to him, charging that A. Orlando Jackson did, on or about the 23d of February, 1877, "at the Southern District of New York, unlawfully, wilfully and knowingly deposit, and

* The Supreme Court held to the same effect, in *Ex parte Jackson*, (6 Otto, 727.)

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cause to be deposited, in the post-office and mails of the United States, then and there, for mailing and delivery, certain circulars concerning lotteries," and commanded him to apprehend said Jackson. Jackson was arrested under this warrant, and brought before the Commissioner on the 13th of March, and was identified as the party charged, and discharged on bail to await trial. Subsequently he was surrendered by his surety, and he demanded an examination before the Commissioner on the charge, and it was had, and the Commissioner, on the 2d of May, decided that there was probable cause to believe that Jackson committed the offence charged, and he committed him to the custody of the marshal, to await the action of the grand jury, in default of \$500 bail. Thereupon he has been brought before this Court on a writ of *habeas corpus* issued to inquire into the cause of his imprisonment, and the proceedings which took place before the Commissioner have been brought before this Court by a writ of *certiorari*. It appeared before the Commissioner, that Jackson, on the 23d of February, 1877, deposited in the post-office at New York City, to be conveyed by mail, a sealed letter envelope, addressed as follows: "J. Ketcham, Lock Drawer 164, Gloversville, N. Y.," and which contained circulars concerning a lottery described as "The Kentucky State Lottery, Simmons and Dickinson, Managers," and also circulars concerning Louisiana and Havana lotteries, the postage on which was duly prepaid by stamps, and that the above named lotteries were authorised by the laws of the respective States of Louisiana and Kentucky and of the Kingdom of Spain.

The prosecution in this case is founded on § 3894 of the Revised Statutes, which, as amended by § 2 of the Act of July 12th, 1876, (19 *U. S. Stat. at Large*, 90,) provides, that "no letter or circular concerning lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mail;" and that "any

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person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this section, shall be punishable by a fine of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution." The amendment of 1876, consisted in striking out the word "illegal" before the word "lotteries," from the section as originally enacted in the Revised Statutes. A part of the statutory provision embodied in § 3894 of the Revised Statutes was originally enacted July 27th, 1868, as § 13 of the Act of that date, (15 *U. S. Stat. at Large*, 196,) in these words: "It shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so called gift concerts, or other similar enterprises, offering prizes of any kind, on any pretext whatever." No specific penalty or punishment was imposed for a violation of this provision. On the 8th of June, 1872, it was enacted as follows, by § 179 of the Act of that date, (17 *U. S. Stat. at Large*, 302 :) "It shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution, is hereby imposed, upon conviction, in any Federal Court, of the violation of this section." It is to be noted, that the word *illegal* was not in the Act of 1868, but was inserted in the Act of 1872, and continued in the Revised Statutes, and stricken out by the Act of 1876.

Congress has, at various times, exercised the power of excluding from the mail various articles, capable of being conveyed in sealed letter envelopes, and of declaring it to be a punishable offence to deposit such articles in the mail. By § 148 of the Act of June 8th, 1872, (17 *U. S. Stat. at Large*, 302,) it was enacted, that no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character,

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shall be carried in the mail, and that any person who shall knowingly deposit for mail or for delivery any such obscene publication, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every such offence, be fined not more than \$500, or imprisoned not more than one year, or both, according to the circumstances and aggravation of the offence. By § 2 of the Act of March 3d, 1873, (17 *U. S. Stat. at Large*, 599), such inhibition was extended to every "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character," and to every "article or thing designed or intended for the prevention of conception or procuring of abortion," and to every "article or thing intended or adapted for any indecent or immoral use or nature," and to every "written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made;" and it was enacted, that any person who shall knowingly deposit, or cause to be deposited, for mail or delivery, any of said articles or things, or any notice or paper containing any advertisement relating to said articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of said articles or things, shall take, or cause to be taken, from the mail, any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, be fined not less than \$100, nor more than \$5,000, or imprisoned at hard labor not less than one year, nor more than ten years, or both, in the discretion of the judge. These provisions were re-enacted in § 3893 of the Revised Statutes, and by section 1 of the Act of July 12th, 1876, (19 *U. Stat. at Large*, 90.)

It is contended for the relator, that, if § 3894 can be construed to cover sealed letters, it is void, as not within any power conferred on Congress by the Constitution. The argument is, that, prior to the adoption of the Constitution, which conferred on Congress, (*Art. 1, sec. 8,*) the power "to

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establish post-offices and post-roads," the States and the people had enjoyed for many years the right of having conveyed by post all sealed letters, without reference to their contents, (unless such contents were liable to destroy, deface, or otherwise injure the contents of the mail-bag, or the persons of those engaged in the postal service, such as liquids, poisons, glass or explosive materials); and that such grant of power must be construed as not authorizing Congress to exclude from the mail what was legitimate mail matter at the time of the adoption of the Constitution. It is further said, that Congress is bound to provide for carrying by mail everything which it prohibits from being carried otherwise than by mail; and that it has made it a punishable offence to carry letters for hire outside of the mail. It is further said, that the exercise of a power absolutely to prohibit the carrying in the mail of sealed letters containing information of a certain character, is not the exercise of a power which is either proper or necessary for carrying into execution the power of establishing post-offices and post-roads; that a power of exclusion, based upon the contents of sealed letters, is an arbitrary power, and may be extended to the exclusion of matters which depend on caprice or whim; and that the exclusion, in the present case, extends to matters which are lawful under the laws of some of the States of the Union, and to matters over which the Federal Government has no jurisdiction.

On the part of the United States it is contended, that it is within the constitutional power of Congress to determine what shall be mail matter; and that, in pursuance of such power, it may lawfully exclude certain articles and things from the mail, although such articles and things are contained in sealed envelopes, and may declare it to be an offence to deposit such articles and things in the mail.

The meaning of the clause in the Constitution, (*Art. 2, sec. 8,*) that Congress shall have power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers," has been settled by judicial construction. It does not mean that no law is authorized which is not

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indispensably necessary to give effect to a specified power. Congress possesses the choice of means, and is empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. (*United States v. Fisher*, 2 *Cranch*, 358, 396.) The necessity spoken of in the clause is not to be understood as an absolute one, but Congress is to be allowed that discretion with respect to the means by which the powers conferred on it are to be carried into execution, which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people. If the end is legitimate and within the scope of the Constitution, then all means which are appropriate, and are plainly adapted to that end, and are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional; and, if a particular law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, an inquiry by a Court into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. (*McCulloch v. State of Maryland*, 4 *Wheaton*, 421, 423; *Legal Tender Cases*, 12 *Wallace*, 539.)

The principal argument on the part of the relator is, that, inasmuch as the exclusive power is given to Congress to establish post-offices and post-roads, it is not authorized to refuse to carry in the mail anything which was lawful mail matter at the time the Constitution was adopted. This line of reasoning has been sought to be applied to other matters of Federal cognizance, but has not met with favor. Thus, Congress is authorized to establish uniform laws on the subject of bankruptcies throughout the United States; and it has been contended, in respect to laws on that subject which have been enacted by Congress, that the power of Congress is limited to the principle on which the English bankruptcy system was founded when the Constitution was adopted, and cannot extend to authorizing voluntary bankruptcies, or to putting into involuntary bankruptcy others than traders, or to granting discharges without the consent of creditors, or to authorizing such compositions as are now provided for. But the view has

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prevailed, that Congress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the Constitution was adopted, and that it is sufficient if the statute relates to the subject of bankruptcies. (*In re Klein*, 1 *Howard*, 278; *In re Silverman*, 1 *Sawyer*, 410; *United States v. Pusey*, 6 *Nat. Bkcy. Reg.*, 284; *In re Reiman*, 7 *Benedict*, 455, and 12 *Blatchf. C. C. R.*, 562.) So, also, in respect to admiralty and maritime jurisdiction. The Constitution declares, (*Art. 3, sec. 2*), that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Prior to the decision in the case of *The Propeller Genesee Chief v. Fitzhugh*, (12 *Howard*, 443,) it had always been understood and held, that, under the Constitution, such jurisdiction was confined to tide-waters. In that case it was held, that, according to the true construction of the grant in the Constitution, the admiralty jurisdiction extended to all public navigable waters, whether influenced by the tide or not. In England, in the text-writers and the decisions, the jurisdiction of the admiralty had always been spoken of as confined to tide-water, tide-water and navigable water being, in England, synonymous terms, and "tide-water" meaning, in England, nothing more than public rivers, as contradistinguished from private ones. At the time the Constitution was adopted, and our Courts of Admiralty went into operation, the English definition of the jurisdiction, that it was confined to the ebb and flow of the tide, was adopted here, by the Courts. But it afterwards became evident, that a definition which would limit public rivers in this country to tide-water rivers was utterly inadmissible, and it was held that the lakes and the waters connecting them were public waters and within the grant of admiralty and maritime jurisdiction in the Constitution.

These illustrations serve to show, that, in construing a grant of power in the Constitution, it is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the Constitution was adopted. A power

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to establish post-offices and post-roads is executed by the single act of making the establishment; but, under such power, it has always been held to be lawful to carry the mail along the post-road, from one post-office to another, and to punish those who steal letters from the post-office or rob the mail. So, under the power to establish post-offices and post-roads, it must be held, that Congress has the right to prescribe what it will carry along the post-road as part of the mail, and what it will not carry, and to render its enactments efficient by punishing as an offence the violation of them. Whether certain things shall be excluded or not is a matter for the sound discretion of Congress, and the discretion of a Court cannot be substituted for the discretion of Congress. The discretion of Congress cannot be fettered by the consideration that a given thing was generally or even universally allowed to be carried in the mail when the Constitution was adopted. To argue against the existence of such discretion because it is possible for Congress to abuse its exercise, by excluding from the mail letters containing matter of a given character, through caprice or from partisan prejudice, is to argue against the existence of all discretion in Congress in the exercise of any of the powers conferred on it. All such discretion may be abused, but the correction of the abuse must be left, under our form of government, to the expression of the will of the people by means of the elective franchise. The existence of the abuse is no argument against the existence of the power. Because an individual judge might not, if a legislator, have thought it wise to exclude from the mail a sealed letter containing matter of a given character, it is not for him, in the exercise of his judicial functions, to hold that such exclusion is not within the constitutional authority of Congress.

Whether the provisions of law which forbid and punish the carrying of letters outside of the mail will be construed as applying to letters which Congress forbids to be carried in the mail, is a question which does not arise in this case.

It is, undoubtedly, not indispensably necessary to the exercise of the power of establishing post-offices and post-roads,

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that letters or circulars concerning lotteries should be excluded from the mails. But Congress is not prohibited from excluding them, and, if Congress regards it as most beneficial to the people, and as calculated to effect in the most proper manner the objects of establishing post-offices and of carrying the mail, to exclude from the mail letters concerning lotteries, whether legal ones or illegal ones, it is for Congress, and not for a Court, to judge of the degree of necessity for such exclusion.

It is also contended, for the relator, that § 3894 of the Revised Statutes does not create any crime or offence against the United States. This is not so. The word "punishable," and the fact that the amount of the fine imposed is discretionary, indicate that a crime is intended and not a pecuniary penalty to be recovered by a civil action.

It is further urged, that, because the only punishment is a fine, and there can be no imprisonment except for the non-payment of the fine, the relator cannot be arrested and deprived of his liberty in the first instance. But § 1014 of the Revised Statutes provides, that, for any crime or offence against the United States, the offender may be arrested, and imprisoned or bailed, for trial. If there be a crime or offence, an arrest for trial may be made, to be followed by imprisonment if no bail is taken, or by bail, even though the punishment, on conviction, be a fine alone. The arrest is made to secure a trial for the offence.

The writ is dismissed and the relator is remanded to the custody of the marshal under the process of commitment by which he was held.

Abram J. Dittenhoefer, for the relator.

Benjamin B. Foster, (*Assistant District Attorney*), for the United States.

The Benefactor.

THE BENEFACTOR.

A collision took place between a steamer and a schooner on the open sea, in clear weather, in broad daylight, the vessels seeing each other at a distance of seven or eight miles and for twenty minutes or half an hour. The schooner did not change her helm except in the moment of peril, when her master attempted to port, but did not succeed, and was compelled to abandon his wheel: *Held*, that the steamer was in fault in attempting to pass the schooner at too short a distance off, and that the schooner was free from fault.

(Before HUNT, J., Eastern District of New York, June 11th, 1877.)

THIS was an appeal from a decree of the District Court, in Admiralty, in favor of the libellants, in a suit *in rem* against the steamship Benefactor, in a cause of collision. This Court made the following findings of fact: The collision between the steamship Benefactor and the schooner Susan Wright, in controversy in this suit, took place a little after ten o'clock in the forenoon of the 26th day of February, 1875, off Squam Beach, New Jersey, and about three miles distant therefrom. The weather, at and prior to the time of the collision, was fine and clear, and the wind about west northwest and strong. The steamship was bound from New York to Wilmington, and the schooner from Matanzas to New York. The steamship was observed by those in charge of the schooner when six or seven miles distant therefrom, and from twenty to thirty minutes before the collision. At that time the steamship bore a point or two off the starboard bow of the schooner. The schooner was close-hauled, sailing on a course about north by west, at the rate of about eight miles an hour. The steamship was proceeding on a course about south southwest, at the rate of about ten miles an hour, with her sails set, and the wind free, and making much leeway. At this time the courses of the two vessels were such as to cross each other, if continued, and such as to bring the two vessels either together or into close proximity to each other, and the two vessels were proceeding in such directions as to involve risk of collision. On the windward side of the two vessels, and

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about three miles distant therefrom, was the New Jersey shore, trending, at that point, about north by east and south by west, and on the leeward side was the open ocean, without any obstruction to safe navigation. There was nothing to prevent the steamship from seasonably changing her course so as to pass either to windward or to leeward of the schooner and give her a wide berth. From the time when the steamship was observed, as above stated, she was watched by those in charge of the schooner, and the schooner was kept close hauled upon her course. The steamship was also kept upon her course, without slacking speed or stopping, until the vessels were only a few lengths apart and a collision was imminent, when the peak of her mainsail was lowered, her engines were slowed and stopped, and an effort was made to pass to leeward of the schooner, but without success. After the steamship was within a few lengths of the schooner and a collision was imminent, the captain of the schooner attempted to avoid the impending collision or lessen its force, by porting the helm of the schooner, but, after putting the schooner's wheel only about two spokes to port, he was driven away therefrom by the nearer and dangerous approach of the steamship, which struck the schooner on her starboard quarter, in consequence of which the schooner sank almost immediately, with her cargo. The schooner kept her course until the steamship was in close proximity and the collision was imminent, and, if there was any change in the schooner's course after that, and before the collision actually took place, it was very slight, had no effect in producing the collision, and was made *in extremis*.

Beebe, Wilcox & Hobbs, for the libellants.

Owen & Gray, for the claimants.

HUNT, J. Nothing can be more clear than that the occurrence of a collision between a steamer and a schooner upon the open sea, in clear weather, in broad daylight, with no storms, the vessels sighting each other at a distance of seven

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or eight miles, and for twenty minutes or half an hour, was the result of great negligence.

The duty of avoiding the collision belonged to the steamer, and she had the most abundant opportunity of doing it. The principal fault of the steamer was in not making the proper arrangement to avoid the schooner, when first discovered. A very slight deviation from her course would have made the divergence so marked as to avoid all peril or alarm, and would not have produced any perceptible effect upon her own voyage. Instead of that she pursued a course which, according to her own evidence, would have carried her to the windward of the schooner a cable's length only, or seven hundred and twenty feet. The wheelsman of the steamer testifies, that, after he took the wheel, the schooner was on his port bow, and he noticed that she kept off a little, (*i. e.*, ported her helm, carrying her to the east;) and that the captain ordered him to port the helm, which he says was done. He further says, that, if the schooner had kept this course and the steamer had kept her course, he would have passed the schooner on the port side, a cable's length from each other, that is, seven hundred and twenty feet. This, with vessels whose conjoined speed equalled eighteen miles an hour, was quite too close a calculation. An allowance of thirty seconds of time, which could be absorbed by a slight excess of steam or a slight increase of wind, is very far from an exercise of reasonable prudence. The presence of a large steamer in such close proximity might well disturb the composure of the navigation of a smaller craft.

There is really but a single question of fact in the case, to wit, whether the schooner so deviated from her course as to justify the action of the steamer. It is by no means clear that the evidence given by the mate, Norwood, establishes such a justification, but I am disposed to rely upon the evidence of the captain of the schooner, which is clear, consistent throughout, and in apparent harmony with all the circumstances of the case. If his testimony is credited, there was no change except in the moment of peril. He attempted to put his

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wheel a-port, but did not succeed in his attempt. The emergency compelled him to abandon the wheel and go to the forward part of the vessel. Whatever was done in this crisis, whether wise or otherwise, is not to be charged as a fault upon the captain. It is the fault of those who forced the emergency upon him. To the same effect is the evidence of the pilot of the schooner, McNamee.

The collision was occasioned by the fault of the steamer, and she should be condemned therefor. The decree of the District Court was right, and should be affirmed, with costs.

IN THE MATTER OF ARTHUR A. HULL, A BANKRUPT.

C. docketed a judgment against H., and an execution thereon was delivered to the sheriff, who at the time had in his possession the goods of H., by virtue of an attachment issued in a suit against H. by W. Afterwards, H. filed a petition in bankruptcy and was adjudged a bankrupt, and J. was appointed his assignee. Independently of the attachment, the sheriff took no possession of the goods of H. until after the petition in bankruptcy was filed. C. applied to the District Court to be paid the amount of his judgment in full, but his application was denied: *Held*, on review, that C. was entitled to be paid his claim in full.

The property being in the possession of the sheriff under the attachment, the lien of the execution attached to it, and remained, although the operation of the bankruptcy proceedings was to vacate the attachment.

The case of *In re Beisenthal*, (*ante*, p. 146,) distinguished.

(Before HUNT, J., Eastern District of New York, June 11th, 1877.)

HUNT, J. This is a petition for a review of the decision of the District Court, in which the conceded facts are as follows: A petition was presented to the District Court, and a motion made thereon, by Collins, Downing & Co., for an order directing John C. Cutter, the assignee of the bankrupt, to pay to Collins, Downing & Co. the amount of their claim in full, upon the following statement of facts, agreed upon by the counsel of the respective parties: "On the 9th of September, 1873, at 12.25 P.M., Collins, Downing &

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Co. docketed in the office of the clerk of Kings County, a judgment against the bankrupt for \$158⁶²/₁₀₀. At 12.30 P.M., of that day, an execution was delivered to the sheriff of Kings County on said judgment. At the time of the delivery of said execution to the sheriff, the sheriff was in possession of the goods of the bankrupt, by virtue of an attachment issued in a suit begun against the bankrupt by West, Call & Whittemore. At 1.20 P.M., of the same day, the petition of the bankrupt to be adjudicated a bankrupt was filed. No actual possession of the bankrupt's property was taken by the sheriff, independently of the attachment of West, Call & Whittemore, until after the filing of the petition. There are no other claims against the estate claiming security or priority, and there are assets in the hands of the assignee sufficient to pay this claim." The District Court denied the motion.

The attachment under which the sheriff held the property of the bankrupt was issued by virtue of a statute of the State of New York. (*Code*, § 227.) It was the duty of the sheriff to seize the property of the alleged debtor, to take it into his possession, and to hold it, as security for the satisfaction of such debt as should be recovered in the proceeding. The general or ultimate property in the goods levied upon was in the debtor. Thus, if the attachment proceedings had been vacated, or, upon trial, the plaintiff had failed to establish his right of action, the title to the property, and the right to possession free from lien or claim, would have existed in the debtor, and this without any affirmative proceeding on his part. The special property, lien and control of the sheriff to and over the property are of the same character as in the case of an execution upon a judgment. If the judgment in such case should be vacated, the special interest of the sheriff, (unless there might be a lien for his fees,) would cease, and the entire property would at once be in the debtor.

In the case of property levied upon and held by a sheriff by virtue of an execution, it is well settled, that, when another execution is placed in his hands, no new levy is needed, but

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the first levy applies to, and is deemed to be made upon the second execution, equally as upon the first. (*Cresson v. Stout*, 17 *J. R.*, 117; *Russell v. Gibbs*, 5 *Cow.*, 390.) In *Birdseye v. Ray*, (4 *Hill*, 158, 160,) speaking for the Court, Judge Nelson says: "The object, as well as the effect, of an actual levy is, to bring the goods into the possession and under the control of the sheriff, for the double purpose of safe keeping, and to enable him, by a sale, to apply the proceeds in payment of the debt. After seizure, they are in the custody of the law, or of one of its ministers, until a sale and delivery to the purchaser; and an actual levy under the second execution would, therefore, be but an idle formality."

We may assume the case, then, as one in which a judgment had been obtained, an execution issued, and a levy made, before the petition in bankruptcy was filed. *Wilson v. City Bank*, (17 *Wall.*, 473,) holds such a lien to be good against the bankrupt proceedings.

I am also of the opinion that the lien would have been complete under the laws of New York, if there had been no levy by the sheriff before the petition in bankruptcy was filed. The statute of New York enacts, that, upon the delivery of an execution to a sheriff, the same becomes a lien from the time of such delivery, upon all the personal property of the debtor within the county, as against every one, except a purchaser for a valuable consideration, without notice of the execution, though no actual levy be made. (2 *R. S.*, 365, 366, §§ 13 to 17; *Lambert v. Paulding*, 18 *Johns. R.*, 311.)

It is argued, however, that to allow this levy to hold the property would be in violation of the spirit of the bankrupt law, which intends, it is said, an equal distribution among the creditors of all the bankrupt's property. It is said, also, that the attachment was not vacated in favor of or for the benefit of the execution debtor, but of all the creditors. No doubt the attachment, when declared by the bankrupt Act to be dissolved, if issued within four months before the commencement of the bankrupt proceedings, is dissolved for the benefit of the estate. But such dissolution does not affect any prior

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liens upon the property, which are recognized by law. The bankrupt Act (§ 14), aims a particular blow at attachment proceedings, as *mesne* process, and declares, that, if made within the preceding four months, the process shall be dissolved. But it makes no such declaration as to an execution, which is final process, or as to the lien of a mortgage. The effect of these liens is determined by a subsequent section (§ 35), and the *bona fides* of the security, with reference to the bankrupt Act, furnishes the test of validity. By the decision of the Supreme Court of the United States, already cited, an execution upon a judgment obtained without the aid or connivance of a debtor, is valid under the bankrupt law. The judgment of Collins, Downing & Co. is not impeached as improperly obtained, and is, therefore, good in its claim as a prior lien upon the property of the bankrupt.

Nor am I able to see any force in the argument, that a defective levy upon an execution does not create a valid levy in favor of a subsequent execution. In this case, the sheriff's possession under the attachment was perfect in fact, and was good in law, when the Collins execution was placed in his hands. The law then and there applied his possession and interest to the execution, and, although the first lien was declared to be void, I see nothing in the statute, or in principle, to impair the lien of the execution.

The case of *In re Beisenthal*, (*ante*, p. 146,) decided by Judge Johnson, is cited. That case, however, may well be sustained without interfering with the views here expressed. An assignment good at the common law, and valid by the laws of New York, had been made by the bankrupt before the petition was filed. Under that assignment the entire property in the goods in question passed to the common law assignee. There was no interest left in the debtor to which the levy of an execution could attach. The execution, therefore, fixed no lien on the goods, as in the present case, and, when the assignment was vacated by the bankruptcy proceedings, the goods came to the bankrupt assignee free from any lien or charge. The case is essentially different from one where the general

La Société Anonyme des Mines v. Baxter.

property in the goods remains in the debtor, where an execution is levied upon that interest, and the goods come into bankruptcy charged with that lien.

Upon the whole case I am of the opinion that an order should be entered directing the assignee in bankruptcy to pay to the petitioners the amount of their claim proved against the bankrupt's estate, and it is ordered accordingly.

Thomas L. Robinson, for the assignee in bankruptcy.

Taylor & Fowler, for Collins, Downing & Co.

LA SOCIÉTÉ ANONYME DES MINES ET FONDERIES DE ZINC DE LA
VIEILLE MONTAGNE

vs.

CHARLES H. BAXTER AND OTHERS. IN EQUITY.

The right of A. to a trade-mark in connection with the dry white oxide of zinc, is not infringed by the sale of a paint composed of a white oxide of zinc ground in oil, and untruly represented as containing white oxide of zinc made by A., such trade-mark never having been applied by A. to that article ground in oil.

(Before BLATCHFORD, J., Southern District of New York, June 12th, 1877.)

BLATCHFORD, J. On the allegations of the bill, the plaintiffs can claim their trade-mark only for the dry white oxide of zinc. It does not appear that they ever sold that article ground in oil, or ever applied such trade-mark to that article ground in oil. The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trade-mark of the plaintiffs. The defendants have not sold the dry white oxide in that state. It is not

Seabury v. Grosvenor.

shown that the plaintiffs have sold such oxide ground in oil. It is true that the oxide is intended to be ground with oil, for a paint. So, flour is intended to be made into bread. But, if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trade-mark therefor, could not claim that the baker had violated his trade-mark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture.

The application must be denied.

Daniel D. Lord, for the plaintiffs.

Dickerson & Beaman, for the defendants.

GEORGE J. SEABURY AND ROBERT W. JOHNSON

vs.

JOHN M. GROSVENOR. IN EQUITY.

Where a person who claimed property in a trade-mark, had acquired it, if at all, by the use, in circulars, of fraudulent and deceptive and untrue language as to the origin and qualities of the article in respect of which the trade-mark was claimed: *Held*, that he had lost his right to claim the assistance of a Court of equity to protect his trade-mark.

(Before BLATCHFORD, J., Southern District of New York, June 16th, 1877.)

BLATCHFORD, J. The evidence is clear that the plaintiffs were systematically and knowingly carrying on a fraudulent trade. Although they may have omitted the fraudulent and deceptive and untrue language from their circulars before this suit was commenced, yet if they have any property in the trade-mark which they claim the title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and

Marsh v. Warren.

in respect of which the trade-mark is claimed. Such language was to the effect, that a celebrated chemist had recently discovered a vegetable principle of great value, and, prior to making it generally known, had introduced it into hospitals, and had generously extended its use to the most successful physicians; that the flattering and astonishing results which characterized its action at once stamped it as the most remarkable principle ever discovered; that the powerful remedy was named Capcine; and that it was used in plasters prepared by the plaintiffs, and called "Benson's Capcine Plasters." A registered trade-mark is claimed in the word "Capcine." Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as those above cited, if they are false. It is shown that there is no such article as Capcine, known in chemistry or medicine, or otherwise. The authorities are clear, that, in a case of this description, a plaintiff loses his right to claim the assistance of a Court of equity. (*Lee v. Haley*, L. R., 5 Chy. Appeal Cases, 159; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J. & S., 142.)

The motion for an injunction is denied.

Rowland Cox, for the plaintiffs.

Joseph W. Howe, for the defendant.

JAMES L. MARSH AND OTHERS

vs.

GEORGE WARREN AND ALEXANDER L. FAIRWEATHER. In
EQUITY.

The statutory provisions which confer the rights and regulate the remedies of persons who register in the Patent Office, under the Act of June 18th,

Marsh v. Warren.

1874, (18 *U. S. Stat. at Large*, 78,) prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948 to 4971 of the Revised Statutes, in regard to copyrights.

(Before BLATCHFORD, J., Southern District of New York, June 19th, 1877.)

BLATCHFORD, J. The statutory provisions which confer the rights and regulate the remedies of persons who register in the Patent Office, under the Act of June 18th, 1874, (18 *U. S. Stat. at Large*, 78), prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948 to 4971 of the Revised Statutes, in regard to copyrights. The exclusive right of printing and publishing, given by § 4952, is given to the author or proprietor only on complying with the provisions of sections 4948 to 4971. One of those provisions, (§ 4956,) is, that no person shall be entitled to a copyright unless he shall, "before publication," deliver at the proper office, (in this case the Patent Office,) a printed copy of the title of the article in respect of which the copyright is to be claimed. In the present case the first label and its title were registered September 24th, 1875. I understand the bill to state that this label was used by the plaintiffs' assignors, in the sale of their mixture, and of the bottles containing it, to which such label was affixed, before that date, and as early as the mixture itself was sold, to wit, June or July, 1875. The sale of the bottles of the mixture, with the label on it, was a publication of the label. At all events, the bill does not allege that the title and label were deposited before the publication of the label. Such averment is necessary. As to the other three labels, they and their titles were registered March 20th, 1877, and I understand the bill to state that those labels were used by the plaintiffs before that date, in the sale of the mixture.

The motion for an injunction is denied.

Amos Broadnax, for the plaintiffs.

Hall & Blundy, for the defendants.

Black v. Munson.

CHARLES N. BLACK, ADMINISTRATOR, &C., AND OTHERS

vs.

DANIEL MUNSON AND HENRY KNIGHT. IN EQUITY.

THE SAME vs. HENRY F. WELLS AND OTHERS. IN EQUITY.

In ascertaining the profits derived by a defendant from the use of a patented improvement in a furnace for burning wet tan as fuel, the plaintiff must show, before the master, the particular profits which accrued to the defendant from using such improvement, and is not entitled to the entire profits arising from the use of the furnace.

Where the plaintiff fails to give evidence as to such particular profits, the Court will not consider exceptions taken by the plaintiff to what is alleged to be incompetent evidence put in by the defendant before the master.

The question of what amounts to a fixed license fee or established royalty, considered.

(Before HUNT, J., Northern District of New York, June 19th, 1877.)

HUNT, J. In the opinion given by me upon the merits of this case, it was held : 1. That the Thompson patent was not intended to include, and did not include, a claim to an invention or discovery of the use of wet tan as a fuel ; 2. That the operation of the heat or fire of the ash pits in drying the wet tan, was not a part of the claim ; 3. That the parts or combinations of the furnace were not claimed, except in their application to the preparation and combustion of wet fuels ; 4. That the construction and operation of the mixing chamber was the elemental idea of the patent, and that this was an improved machine by which the principle of mixing and applying the different heated gases is carried out ; 5. That the defendants' machines infringed the right thus secured by Thompson's patent.

In examining the exceptions made to the master's reports, I am not able to see that he has erred in the principles of law laid down by him. The principles laid down by the master,

which are embraced within the first four of the complainants' exceptions, fall within the conclusions above stated, and the exceptions must be overruled.

The fifth exception is to that part of the report which announces "that the complainants' patent only secures to the patentee a part of the furnace, and it was the duty of the complainants to show by proofs, which they have failed to do, the particular profits which have accrued to the defendants from the use of the particular improvement of Thompson's, and that this was necessary in order to show any savings to the defendants, or profits made by them, by the use of Thompson's invention." This principle is sound, and, applied to the present case, means, that the defendants cannot be charged with the profits arising from the use of a furnace which burns wet tan as a fuel, and which dries the tan, in its use, by means of its fires or ash pits, and which also uses a mixing chamber upon the principle of Thompson's furnace. The first two operations the defendants have the right to use, and all the profits and advantages to be made from their use belong to them. They infringe upon no right of Thompson or the complainants, in such use. Thompson's patent gives a monopoly of the use of the mixing chamber only, and it is only for the profits that arise from that portion of the furnace that he can claim damages. It is possible that the profits made by the defendants' machine are in spite of, rather than in consequence of, the use of the mixing chamber described. Conceding that the apparatus and process of Thompson are used by the defendants, it does not follow that the profits of the business are due to that source. The master justly says, that it is the duty of the complainants to make proof of the profits arising from the use of that portion of the furnace which is included in Thompson's improvement. The opinion before referred to, and that of Judge Blatchford in the Thorne case, (*Black v. Thorne*, 10 *Blatchf. C. C. R.*, 66,) both hold, that the furnaces constructed after the models of the Hoyt, Sparrowbush, Crockett and Morrison furnaces, as arranged before the date of Thompson's invention, are not in conflict with Thompson's

patents. I consider it clear, therefore, that the principle laid down by the master, as applied to this case, is a sound one. It is not enough, therefore, for the plaintiffs to prove, that, in burning wet tan in his furnace, and in using Thompson's improvement, the defendant Knight saved \$5,691 in the item of wood, between January 1st, 1864, and May 22d, 1872. They must show, also, that this economy was due to the use of Thompson's improvement, to wit, the construction and apparatus of the mixing chamber. This they fail to do.

The plaintiffs also except to the decision of the master in permitting proof to be made, that the defendants are now burning wet tan in Hoyt's or Crockett's furnaces. This is supposed to be what is meant by the seventh exception, which is entirely general in its terms, not specifying whose testimony, or on what points, or on what occasion, or as to what subject, the objection is taken. I think this exception must be overruled for the reasons following: 1st. It is too general; 2d. Assuming that it refers to the evidence intended to rebut the claim of damages, by showing that an equally good result was produced in the furnaces in which wet tan is burned which did not use Thompson's improvement, it comes within the principle of *Mowry v. Whitney*, (14 *Wallace*, 620.) What advantage did the defendants derive from using the plaintiffs' improvement, over any other furnace open to their use? 3d. If, as I have before stated, the plaintiffs have failed to establish their claim by showing what portion of the profits was due to the use of Thompson's improvement, then the defendants are not put upon their defence in that respect, and, whether they gave incompetent evidence, or no evidence, is not important. If their evidence, in this respect, is all stricken out, they are protected by the plaintiffs' failure. They are not called upon to rebut until the plaintiff has made out a case.

The plaintiffs contend, further, in their eighth exception in the Wells case, that they have made out their damages upon the *datum* of a fixed license fee for the use of the improvement. In an action in equity, (which is this case,) profits made by the assignee by the use of the improvement, con-

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stitute the general measure of damages. Sales, or a royalty established, on the other hand, constitute the primary criterion of damages in actions at law (*Burdell v. Denig*, 2 Otto, 716;) but, in any Court, this latter rule can only be applied, where there is a fixed and established price at which a license is granted. No price can be said to be fixed, or royalty established, where the patentee varies his price according to the courage, or the ability to resist, of the infringer, or where there are other circumstances showing the absence of a fixed and established fee. The master states, in his report, that the counsel and plaintiff (Mr. Black) admitted, on the argument before him, that he had not established any fixed license fee. I must assume this to be true. Mr. Black's testimony shows, that two-thirds of those who took licenses from him, did so after suit commenced against them, and a liability to be stopped in their business by injunction, and that the amounts varied from \$100, the sum received from Mr. Wood, to \$2,500, the amount collected from Mr. Stevens by litigation. To the Boston Dye Wood Co. he gave a license for the sum of \$3,000, but afterwards deducted \$1,250, because their furnace did not work well. None of the licenses given by him expressed any limitation as to the amount of business to be done under it. I know of no authority and of no principle, on which, under these circumstances, it can be held that damages are established by the existence of a fixed license fee or an established royalty.

I have not discussed or passed upon the exceptions *seriatim* or by numbers, but the views expressed cover the whole case, and I am of the opinion, and do decide, that each and every one of the said plaintiffs' exceptions should be overruled.

Charles N. Black, for the plaintiffs.

Dorman B. Eaton, for the defendants.

Torrey v. The Grant Locomotive Works.

SAMUEL W. TORREY

vs.

THE GRANT LOCOMOTIVE WORKS.

A suit was brought in a State Court, in August, 1875, and proceedings for its removal into this Court were taken, under subdivision 3 of § 639 of the Revised Statutes. The bond given was such a bond as is provided for by § 639, and not such a bond as is provided for by § 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) It contained no provision for costs: *Held*, that the suit was not properly removed.

(Before BLATCHFORD, J., Southern District of New York, June 26th, 1877.)

BLATCHFORD, J. Whether subdivision 3 of section 639, of the Revised Statutes, is or is not repealed by the provisions of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) I do not consider it necessary now to decide. Even if, when a suit is one between a citizen of the State in which it is brought and a citizen of another State, the latter may still, notwithstanding the Act of 1875, and although the term at which the cause may be first tried has passed, remove the cause, on his petition, whether he be plaintiff or defendant, provided he files the petition in the State Court before the trial or final hearing of the suit, and, before or at the time of filing said petition, makes and files in the State Court an affidavit stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such State Court, yet such a suit is a suit in which there is "a controversy between citizens of different States," within the language and meaning of section 2 of the Act of 1875. That section, and subdivision 3 of section 639, of the Revised Statutes, apply, each of them, fully and distinctly, to the removal of a suit of a civil nature, at law or in equity, pending at the time of the passage of the Act of 1875, or thereafter brought in any State Court, where the amount or matter in dispute, exclusive of costs, exceeds the sum or value

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of \$500, if such suit is a suit between a citizen of the State in which it is brought and a citizen of another State, and each of them authorizes its removal by the latter, whether he be plaintiff or defendant. Under subdivision 3 of section 639, the petition for removal may be filed at any time before the trial or final hearing of the suit, and there must be made and filed, before or at the time of filing the petition, the affidavit above mentioned. Section 639 provides, that, in order to such removal, the petitioner, in the cases mentioned in it, must, with his petition, offer surety of a specified character. This includes merely surety that he will enter in the Federal Court copies of proceeds and proceedings, and appear there and enter special bail, if requisite. It does not include a bond, with surety, for paying any costs. But section 3 of the Act of 1875 provides, that, whenever either party entitled to remove a suit mentioned in section 2, shall desire to remove it, he may file a petition in the State Court, for its removal, "before or at the term at which said cause could be first tried, and before the trial thereof," and shall file therewith a bond, not only for entering in the Federal Court a copy of the record in the suit, and for there appearing and entering special bail, but a bond "for paying all costs that may be awarded by the said Circuit Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto." The limitation of time within which the petition may be filed, and the fact that, under section 639, it may be filed at a later period than it can be under the Act of 1875, has nothing to do with the character of the bond. The present suit is one which falls within the provisions of section 3 of the Act of 1875, in regard to the terms of the bond required. It is a suit at law of a civil nature, brought in a State Court, in August, 1875, the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and it is a suit in which there is a controversy between citizens of different States. It is, therefore, a suit mentioned in section 2 of the Act of 1875, and one of the parties to it has undertaken to remove it by filing his petition for removal in the State Court. He may be in time, because within the time

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limited by subdivision 3 of section 639, although not within the time limited by section 3 of the Act of 1875 ; but, even if he claims the benefit of the longer time allowed by section 639, he must give the bond prescribed by the Act of 1875. He has not given such bond. The bond he filed contained no provision for costs.

It was held by Judges McKennan and Cadwalader, in *McMundy v. The Connecticut General Life Ins. Co.*, (9 *Chicago Legal News*, 324,) that the Act of 1875 takes the place of all former Acts, in the requirements which it makes for the removal of all causes to which it is applicable ; that, even though a removal was sought under section 1 of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 558,) embodied in subdivision 3 of section 639, of the Revised Statutes, the requirement of section 3 of the Act of 1875, in regard to the nature of the bond, extends to such a case, as being a case mentioned in section 2 of the Act of 1875 ; that, to that extent, at least, the Act of 1875 repeals all prior Acts on that subject ; that the filing of the bond conditioned as required by the Act of 1875, is a condition precedent to the removal of the cause to the Federal Court ; and that, if the required bond has not been filed, that Court has no jurisdiction, although it belongs to that Court exclusively, and not to the State Court, to decide that fact.

The plaintiff's motion to take from the files of this Court the papers which the defendants have filed here is granted.

Joseph H. Choate, for the motion.

George H. Forster, opposed.

NOYES L. AVERY vs. THE TOWN OF SPRINGPORT.

A statute authorizing a town to issue bonds in aid of the construction of a railroad, provided that the bonds should be under the hands and seals of commissioners. They issued coupon bonds which were not sealed, although their wording showed that sealing was intended, and the coupons were not sealed: *Held*, in a suit on the coupons, that the bonds and coupons were void.

(Before JOHNSON, J., Northern District of New York, June 28th, 1877.)

JOHNSON, J. The material question in this case is, whether the execution of the instruments called bonds was sufficient in form to bind the defendant. The statute under which they purport to have been issued was a law of New York, entitled, "An Act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof," passed April 24th, 1869, (*N. Y. Laws of 1869, vol. 1, p. 677*). The 2d section of the Act is the only one which authorizes any one to bind the town for the payment of money in aid of the railroad to be constructed. It enacts, that "it shall be lawful for the said commissioner or commissioners" (for whose appointment provision was made by the 1st section) "to borrow on the faith and credit of the said town" a certain sum of money, at a rate of interest not exceeding seven *per cent.*, for a term not exceeding thirty years, and to execute bonds therefor under their hands and seals. The instruments sought to be treated as bonds under the statute are not under seal, although their wording shows that sealing was contemplated, as a necessary part of their execution. This action is brought upon a certain number of coupons detached from bonds so executed without seals. The coupons are not themselves sealed, nor are any of them executed by the signature of more than one commissioner. They are, therefore, subject to all the difficulties which the bonds are liable to. The defect, if it be one, being in the execution, which does not pursue the direction of the statute, neither the plaintiff nor any one

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else can have become possessed of the bonds without knowledge of the absence of seals and of the requirements of the statute in that regard. This action is on the instruments, and the recovery can be only had on them. The law which authorizes bonds to be issued prescribes the form and mode in which they are to be executed. They are to be under the hands and seals of the commissioners. Instruments under their seals and not under their hands, or under their hands and not under their seals, are alike not executed in conformity with the statute, and are alike inoperative to create an obligation against the town. The principle is involved in *The People v. Mead*, (24 N. Y., 114,) where instruments called in the statute bonds were held properly executed without being sealed, the Act directing their execution to be under the official signatures of certain designated officers, and that mode of execution having been employed. Various cases have been cited showing that a party required to give an instrument under seal, cannot, in an action against him, insist on his own omission to seal the instrument, as a defence. Such was the case of an unsealed bond on attachment, (*Kelly v. McCormick*, 28 N. Y., 318,) and the case of *United States v. Linn*, (15 Peters, 290,) where the bond of a surety for a receiver of taxes was unsealed. The Court held, in that case, that the instrument was a good obligation at common law, unsealed. Other cases resting on the same grounds are cited, but none of them give any countenance to the idea that a mere statutory power can be so executed as to impose an obligation, unless the statutory authority is pursued. In *Town of Coloma v. Eaves*, (2 Otto, 484, 489, 490,) stress is laid upon the fact that the execution of the instruments was in exact conformity with the provisions of the statute; and it is held, that, by such an execution, the statutory prerequisites to the issuing of the bonds are established in favor of a *bona fide* holder for value. In the same case, the doctrine of the Courts of the United States is stated, perhaps, in its broadest form, in support of the rights of *bona fide* holders of municipal bonds, so far as compliance with precedent conditions prescribed by statute is concerned, where

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the requisite legislative authority has been given to a municipal corporation, or its officers, to issue municipal bonds. But, in none of the cases have I found even an intimation that anything will serve to supply the want of an execution such as the statute calls for. Indeed, it seems plainly to result from the fact that the power originates only from the statutory grant, that the statute must be followed in order to make out an execution of the statutory power.

The verdict must be set aside for the erroneous ruling at the Circuit in respect to the want of the seal, and a new trial must be ordered, with costs to abide the event.

James R. Cox, for the plaintiff.

George F. Danforth, for the defendant.

1,265 VITRIFIED PIPES, &c.

Under an ordinary bill of lading, freight is demandable only when the goods are discharged from the vessel and an opportunity is had for their examination by the party who is to receive them; but the carrier is not bound to part with the possession, or to make actual delivery, except upon payment of the freight.

Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels, on the freight of such parcels being separately paid.

Where a carrier of goods by a vessel stood upon his legal right not to deliver a cargo, or any part of it, till payment of the freight, and the consignee of the cargo stood upon his right not to pay the freight until the cargo was discharged ready to be completely delivered upon payment of freight, and subsequently the cargo was landed, but no notice was given to the consignee nor any demand made upon him for the freight: *Held*, that a suit against the goods for the freight was prematurely brought, when brought before such notice or demand.

Where the amount involved in an Admiralty suit is not sufficient to permit a review by the Supreme Court of the judgment of the Circuit Court, a general finding of facts and law by the latter Court is sufficient, under the Act of February 16th, 1875, (18 U. S. Stat. at Large, 315, § 1.)

(Before JOHNSON, J., Southern District of New York, July 19th, 1877.)

JOHNSON, J. The rule of law in respect to the delivery of merchandise from vessels is well settled. Under the ordinary bill of lading, the freight is demandable only when the goods are discharged from the vessel, and an opportunity is had for their examination by the party who is to receive them. On the other hand, the carrier is not bound to part with the possession, or to make actual delivery, except upon payment of the freight. Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels, on the freight of such parcels being separately paid. All such arrangements rest upon the special agreement of the parties concerned, and not upon the general law. In *Clark v. Masters*, (1 *Bosworth*, 177, 185,) Duer, Ch. J., states the rule thus: "The consignee is not bound to pay the freight until the goods are delivered, nor the master to deliver the goods until the freight is paid. If the goods are withheld, the freight must be tendered, if the freight, the goods, to enable either party to maintain an action against the other for a breach of contract." In the case of *The Eddy*, (5 *Wall.*, 481,) Mr. Justice Clifford, giving the opinion of the Supreme Court of the United States, says: "Delivery on the wharf, in the case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees, and the different consignments be properly separated, so as to be open to inspection, and conveniently accessible to their respective owners. Where the contract is to carry by water, from port to port, an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required, in order to discharge the carrier from his liability. He may deliver them on the wharf; but, to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody."

The question in this case, therefore, is, whether the libellants, at the time the libel was filed, were in that condition, in respect to the goods in question, which entitled them to de-

mand payment from the claimants, or entitled them to assert, as against the goods themselves, not a mere lien for payment, or a right to hold the possession of the goods until payment was or should be made, but a right to require immediate payment of the freight, as against the goods carried.

In illustration of this position, Mr. Justice Curtis may be cited, who says, in *The Salmon Falls Manu'g Co. v. The Bark Tangier*, (11 *Monthly Law Rep., N. S.*, 6, 9: "If the carrier is not ready to deliver, it is of no importance from what cause such want of readiness proceeds. Whether it be because the goods are still in the vessel, or because they are so mixed with others on the wharf, that they are not accessible, * * * is immaterial. If he is not ready to deliver, the law does not deem the delivery made." In the case of *The Middlesex*, (*Id.* 14, 15,) the same learned judge says: "When the master of the vessel gives notice to consignees of cargo, that the vessel is about to discharge at a particular wharf, it is deemed equivalent to a declaration by him that he will be in readiness to deliver the cargo there, at some proper time, as soon as, by the use of due diligence, he can get it out of the vessel in a state to be delivered. * * * It must be remembered, that it is not knowledge of the arrival of the vessel, and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact."

The first communication upon the subject of the delivery of the pipes was contained in a note from Thomas Dunham to Nelson, dated February 21st, in which Dunham says: "I am anxious to secure to the vessel the freight on the pipes before delivery, and beg of you to send me check for the amount. Otherwise, I must take legal measures to secure the payment of the same." This communication was made before the vessel was ready to commence the discharge of the pipes. On the 26th another note was sent to Mr. Nelson from Mr. Dunham, notifying him that the vessel would that morning commence to discharge on Pier No. 19, East River, the stone-ware sewer pipes, rings, &c., consigned to him. It adds: "You are requested to pay the amount of freight named in

1,265 Vitrified Pipes, &c.

the bill of lading upon the same, and remove them from the wharf. Upon payment of the freight, the pipes, &c., will be delivered to your carts. If not paid and removed from wharf I shall proceed against them to collect it." On the same day and immediately upon the receipt of the note last mentioned, Nelson wrote to Dunham, and had delivered at the office of the latter, his answer, in which he says: "When the goods are on the wharf, and I am properly notified of same, I shall then pay the freight due on them; or, I will take them away from wharf and pay you, ton by ton, freight on same, for all pipes, rings and covers delivered as per bill of lading held by me. If I do not hear from you by one p.m., to-day, of your election of either of above propositions, I shall be in attendance on the wharf at that time, and make formal demand of my property, and shall hold you responsible," &c. To this communication no reply was made, and about or shortly after one o'clock, Mr. Nelson, the claimant, with his clerk Mr. Walmsley, went to Mr. Dunham's office, and there, having in his hand the amount of the freight, according to the bill of lading, said to a person in charge of the office, that he was ready to pay the freight, and demanded his pipes by the H. L. Routh. To this the reply was, that the pipes would not be delivered except upon the payment of the full amount of freight, as per bill of lading. The parties then proceeded to the wharf where the vessel was, and there it appeared that a part only of the pipes were discharged. As to what then took place the witnesses are not exactly agreed, except that no adjustment took place of the questions as to the respective claims of the parties. The libellants appear to have insisted that the whole freight should be paid, before the claimant should take any part of the goods from the wharf. On the other hand, the claimant insisted that he was not bound to pay the freight until all the goods were discharged from the ship, in order that there might be opportunity to examine the goods before the completion of the delivery and payment of the freight. Each party seems, by law, to have been right in the view thus presented; and, of course, neither

was, so far, in fault. The claimant further offered to take the cargo in parts, as the same was landed, paying the proportional part of the freight, but this the libellants refused to permit, as was their right; and the parties separated without any adjustment of their conflicting views. The claimant reiterated, on leaving, that, when his goods were discharged and ready for delivery, he would, on notice, pay the freight and take them away. It was made a question, in the District Court, whether the claimant did not insist that he was not liable to pay for any broken pipes or rings contained in the cargo, even though not broken by the fault of the carrier; and such was the view of the evidence taken by the District Court. Further evidence was adduced in the Circuit Court, which satisfies me that no such ground was taken by the claimant. From some controversy which had formerly taken place between the same parties, the persons acting for the libellants probably apprehended that the claimant would object to pay for broken pipes and rings, and they, therefore, stood upon their legal right not to complete the delivery of the cargo, or any part of it, till payment of the freight. On the other hand, the claimant stood upon his right not to pay the freight until the cargo was discharged, ready to be completely delivered upon payment of freight. Neither party was, at this period, in default, and neither was in a condition to maintain an action against the other. Subsequently, the cargo was landed, but no notice was given to the claimant, nor was any demand made upon him for the freight. Assuming that the libel was not filed until after the pipes and rings were all discharged, it was premature, because there was no offer, tender or notice of readiness to deliver, at any time when it was in the power of the carrier to make delivery on receiving the freight. In the ordinary course of trade, property is allowed to be taken away as landed, either on receiving the *pro rata* freight or security for payment; but the claimant's offers in these respects were rejected. Each party chose to stand upon the legal right, and must be judged accordingly. The libellants fail, therefore, to maintain their case, because, when the libel was

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filed, the claimant was not in default in not paying the freight. But, I might well go further and assert, that, upon the proof, it appears that the libel was filed before the pipes and rings were discharged from the vessel. I do not see that the examination of this question, upon the evidence, in detail, can be of any advantage to the parties or to the law in general, and I, therefore, content myself with stating the conclusion at which I have arrived.

In regard to the findings of fact and law required by the Act of February 16th, 1875, (18 *U. S. Stat. at Large*, 315, § 1,) they seem to be required in view of the exercise of the appellate power of the Supreme Court of the United States, and, therefore, where the amount involved is not sufficient to permit a review of the judgment of the Circuit Court by the Supreme Court of the United States, a more general finding only must be sufficient.

The decree of the District Court, (5 *Benedict*, 402,) must be reversed, and the libel be dismissed, with costs.

Franklin A. Wilcox, for the libellants.

Edwin W. Stoughton and *Edward Seymour*, for the claimant.

THE UNITED STATES

vs.

CHARLES E. BACON AND CALVIN F. S. THOMAS.

C., as special agent of the Post-Office Department, prosecuted an action given by statute, as well for himself as for the United States, to final judgment, against T., the avails of which, as to costs, would belong to him alone, and, as to damages, to him and the United States, in equal parts. The bond of T. and

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B., running to the United States alone, was taken in satisfaction of such judgment. A large part of the sum due on the bond was paid, and, out of it, the costs of the suit, belonging to C., were paid, and the balance was divided between him and the United States. Suit was then brought by the United States, on the bond, to recover the balance due on it, and judgment was obtained. Satisfaction of such judgment was entered, without payment made, by the law officers of the United States, by direction of the Post-Office Department. C. moved to set aside the entry of satisfaction: *Held*, that the motion must be denied.

(Before WHEELER, J., Northern District of New York, July 27th, 1877.)

WHEELER, J. This cause has been heard upon the motion of Frederick Carlisle to set aside the entry of satisfaction of judgment recovered therein as of the October Term, 1870, entered by the law officers of the Government of the United States, under direction of the Post-Office Department, on the ground that the judgment had been obtained at his expense, and that one-half the damages and all the costs therein belonged to him, and that the satisfaction had been entered in violation of his right. From the documents and evidence made a part of the case for the purposes of this hearing, it appears, that he, as special agent of the Post-Office Department, prosecuted an action given by the statutes of the United States, as well for himself as for the United States, to final judgment, against Calvin F. S. Thomas and one Andrew F. Lee, the avails of which, as to costs, would belong to him alone, and, as to damages, to him and the United States, in equal parts; that the bond of Thomas and the defendant Bacon, running to the United States alone, was taken in satisfaction of that judgment; that a large part of the sum due on the bond was paid by the obligors, or one of them, out of which the costs of the suit, belonging to Carlisle, were paid, and the balance was divided between him and the United States; that this suit was brought to recover the balance due on the bond, in which judgment for that balance, \$33,021 98, was entered; and that satisfaction of that judgment was entered, without payment made, by the law officers of the Government, by direction of the Post-Office Department, to which branch of the Government the control of the suit, so far as the Government was

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concerned, belonged. From this statement, it appears clearly, that the bond, when taken, actually belonged to the United States and to Carlisle in equal parts. The ownership of it was precisely the same as that of bank notes would have been, if such notes had been taken in satisfaction of the same judgment. The bond ran, in terms, to the United States, but it was the same, in effect, as if it had run to the United States and to Carlisle. Then it would have been an obligation to him and the United States jointly. Now it was an obligation to the United States, as to one-half, in the right of the United States, and, as to the other, in trust for him. His right, in equity, was just the same as if it had run to both, but was not, either at law or in equity, any greater than as if it had so run. Both now and then the United States owned or would own one-half of it, and would have the right to release that half, either with or without satisfaction. After such release, no action could, in either case, be maintained by the owner of the other half. Not if made to the two, because neither could maintain an action on it without both; and both could not, for one had been satisfied. (*Ruddock's Case*, 6 Co. Rep., 25; 1 Pars. on Cont., 26; *Pierson v. Hooker*, 3 Johns., 68; *Wilson v. Mower*, 5 Mass., 407; *Eastman v. Wright*, 6 Pick., 316; *James v. Aiken*, 47 Vt., 23.) And not if made to the one, because that one had been satisfied for his part. Had the United States been the mere trustee of Carlisle, and he the real owner of the bond, the United States would have had nothing in it to release; and the Court, in such a case, would always prevent a release or entry of satisfaction from having operation. But, here, the United States was nominally the sole, and, in reality, a joint, plaintiff, and, as such joint plaintiff, had the right, so far as the defendant was concerned, to release the action or the judgment in it. It was mentioned by Parsons, Ch. J., in *Wilson v. Mower*, and stated by Morton, J., in *Eastman v. Wright*, above cited, that, if a joint promisee unjustly releases an action, to the injury of others, they have a remedy by action. Whether Carlisle has a remedy otherwise than upon his motion, is not in question here.

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The only question is, as to whether the United States could release the action on the bond belonging to the United States and Carlisle. For the reasons stated it is considered that the release was valid, and the motion is denied.

Richard Crowley, (District Attorney,) for the plaintiffs.

John H. Buck, for Carlisle.

George Wadsworth, for Bacon.

E. MILLER & Co.

vs.

THE BRIDGEPORT BRASS COMPANY. IN EQUITY.

The second claim of the reissued letters patent granted to E. Miller & Co., as assignees of Joshua E. Ambrose, January 11th, 1876, for an "improvement in lamps," (the original patent having been granted October 16th, 1860, and reissued May 20th, 1873, and, as so reissued, extended for 7 years from October 16th, 1874,) namely, "The combination, in a lamp burner, of the following elements : first, a deflector ; second, a perforated air distributor, which, with the deflector, forms the combustion chamber ; third, a wick tube, extending from the fount to the combustion chamber ; fourth, a tube or passage to conduct the gas from the fount to said combustion chamber, substantially as described," is for a different invention from any which was described and claimed in the original patent, and is invalid.

The combination contained in said second claim contains a lesser number of ingredients than the combination which composed the original invention, and the specification of the original patent did not suggest that a lamp containing the modified combination of the second claim of the reissued patent was feasible and within the scope of the invention, and, therefore, under the rule laid down in *Gill v. Wells*, (22 Wall., 1,) said second claim is void.

(Before SHIPMAN, J., Connecticut, August 11th, 1877.)

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement, by the defendants, of reissued letters patent,

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which were issued on January 11th, 1876, to the plaintiffs, as assignees of Joshua E. Ambrose, for an "improvement in lamps." The original Ambrose patent was dated October 16th, 1860, and was reissued May 20th, 1873, and the patent, as reissued, was extended for seven years from October 16th, 1874. The principal defences are, that the reissue is not for the same invention which was described and claimed in the original patent, and that the patent is void for want of novelty.

In the original patent, the patentee declared the object of his invention to be, to obtain a lamp which will burn, without a chimney, and without danger of explosion, those hydrocarbons which are volatile, and contain an excess of carbon, and stated that "the invention consists in the employment or use of a perforated cap, vapor tube, heaters and deflecting plate, arranged," as described, and in a wick-adjusting mechanism, which last-named element is immaterial in this case. In the specification, the invention was, in substance, described to be the upper part of the body of a lamp, which received at its upper end a cap, C. This cap was of cylindrical form, and might be constructed of perforated sheet iron, the upper end having a perforated plate, *c*, fitted in it. The wick tube was within the cap or perforated cylinder. Adjoining the wick tube was a tube, F, the lower end of which communicated with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate, *c*. On the upper end of the cap, C, was placed a copper dome-shaped heater, G, slotted at its upper end. A longitudinal bar in the centre of the slot divided it into two parts. The specification proceeded: "The wick tube, E, extends some distance above the perforated plate, *c*, and, on its upper end, a collar, *p*, is fitted, said collar having plates, *q*, projecting from it, slightly inclined from a horizontal plane. Between the inner ends of the plates, *q*, and the collar, *p*, there are openings, *r*. On the outer side of the heater, G, there are vertical ribs, *s*, at the lower ends of which there are projections, *t*. These projections, *t*, serve as bearings for a heater, H, which is similar to G,

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in form. The ribs and projections, *t*, admit of a space, *u*, being between the two heaters, and the upper end of the heater, *H*, is slotted, as shown at *v*, and has a plate, *w*, extending upward for each end of it, and inclined at an angle of about 45°. The tube, *F*, admits of all vapor generated in the body, *A*, of the lamp, escaping up into the heater, *G*, and to the flame, the perforated plate, *c*, preventing the ignition of the vapor below the orifice of the tube. The plates, *q*, of the collar, *p*, and the openings, *r*, cause a draught to ascend directly upward to the flame, and air is also deflected directly against the inner sides of the heater, *G*, and becomes intensely heated, so as to supply the flame with warm oxygen. The bar, *o*, in the slot, *n*, of heater, *G*, serves to divide the flame, and prevents it from ascending up through the slot, *n*, before the carbon is consumed. Between the two heaters, *G*, *H*, oxygen passes and becomes highly rarified, and unites with the carbon in the flame, insuring perfect combustion. The plates, *w*, at the ends of the slot, *v*, of heater, *H*, serve to spread the flame and diminish its height, thereby keeping the flame at the point where the heat is most intense. The flame at the slot, *n*, in heater, *G*, is merely a gas-generating flame, the illuminating flame having its base at the slot, *v*, of heater *H*. By this arrangement the flame is supplied with sufficient oxygen, without a chimney, to support proper combustion and produce a brilliant illuminating flame, and the vapor which passes up through tube, *F*, is consumed without danger of being ignited below the orifice of said tube." The patentee, after stating that he was aware that dome-shaped heaters had been previously used, and, also, that perforated caps had been used in connection with said heaters, and disclaiming said parts when separately considered, claimed as his invention, "1st, The arrangement of the heaters, *G*, *H*, with a space between them communicating directly with the external air, in connection with the collar, *p*, and plates, *q*, *q*, fitted on the top of the wick tube, *E*, and the perforated cap, *C*, substantially as and for the purpose set forth; 2d, In combination with the parts aforesaid, the vapor tube, *F*, placed within the cap, *C*, and

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adjoining or contiguous to the wick tube, as and for the purpose specified."

This lamp was not a success, as a lamp which would burn without a chimney, and did not go into general use, but it contained valuable features. The tube, F, conducted the gas from the fount to a point near the end of the wick tube, so that the gas was conveyed to the flame and was consumed, and thus the danger of explosion was materially diminished. In addition, the upper part of the perforated cap, C, was a minutely perforated plate, or disk which extended transversely over the entire top of the cap, below the flame, (forming the floor of what is styled, in the reissued patent, the combustion chamber,) and prevented the return of lighted gas to the lamp fount below, or the ignition of gas within the cap, C, upon the principle of Sir Humphrey Davy's safety lamp. Thus, the combination of the tube and the perforated plate prevented danger of explosion. The perforated plate also performed the office of a distributor of air into the space where the wick was lighted and to the flame.

Lamps having these characteristics, in connection with the other well known parts of volatile oil lamps—a wick tube, a dome-shaped chamber, which serves to direct the air to the flame, and is generally called a deflector, and a chimney, were subsequently manufactured by the owners of the patent, and went into general use. The patent was reissued for the second time, in 1876. The specification of the reissue declares that the invention consists, secondly, "in combining, in a lamp burner, a deflector, a perforated air distributor, with the deflector, forming the combustion chamber, a wick tube extending from the fount to the combustion chamber, an adjusting device to regulate the elevation of the wick, and a tube to conduct the gas from the fount to the chamber above the air distributor." The descriptive portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification. In the new specification prominence is given to the perforated plate c, which is called "a perforated air distributor, which, with

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the deflector, forms the combustion chamber." The second claim, which is the only one which is alleged to have been infringed, is as follows: "2. The combination, in a lamp-burner, of the following elements: first, a deflector; second, a perforated air distributor, which, with the deflector, forms the combustion chamber; third, a wick tube, extending from the fount to the combustion chamber; fourth, a tube, or passage, to conduct the gas from the fount to said combustion chamber, substantially as described."

The lamps made by both plaintiffs and defendants contain the heater, G, without the ribs or projections or longitudinal bar; in other words, an ordinary deflector, the perforated plate, the vapor tube, and a wick tube; and are in great demand by the public. The utility of the lamp consists in its safety. •

A tube which conducted the vapor from the fount to the flame was used, in its simplest form, in the lamp of William Pratt, patented in 1857. In this lamp the flame was not to be protected from the external air. The wick tubes were the long diverging tubes now in common use.

Air distributors had long been known in lamps of the Ambrose class, but I am of the opinion that the minutely perforated transverse plate, c, extending across the lower part of the chamber below the flame, thus forming a perforated floor, and performing the double office of preventing the lighted gas from communicating with the gas in the lamp fount, and also of distributing air to the combustion chamber, had not been anticipated in the defendants' exhibits. But it is not necessary to determine whether either the tube or the air distributor was novel in itself, as the combination only is claimed, and I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber, and the perforated plate constructed as in the Ambrose patent, and performing its double office, with a wick tube, and with either the heater or deflector of Ambrose, or the ordinary deflector, was unknown prior to the date of the patent.

The important question in the case is, whether the lamp

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which is described and claimed in the second claim of the re-issue, is the same invention which was described and claimed in the specification of the original patent. The principles upon which the decision of this question rests, are stated in *Gill v. Wells*, (22 Wall., 1,) and in *Stevens v. Pritchard*, (10 Pat. Office Gazette, 505.) In the former case, the Court, after declaring the rule to be, that, where a patentee who has invented a new and useful combination of several ingredients, also claims to have invented new and useful combinations of fewer numbers of the ingredients, the inventor is entitled to a patent for the several combinations, and may give a description of the several combinations in one specification, and may secure the benefit of each of the inventions by separate claims, and that if, by inadvertence, he should fail to claim one of the described combinations, may surrender the original patent and obtain a reissue for any combinations which were omitted in the claims of the original patent, proceed to say: "Very different rules, however, apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication or intimation that any other invention, of any kind, has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee in the combination of the smaller number of the ingredients, by a surrender of his first patent and a re-issue of the same, which shall include the second combination as well as the first, because, the reissued patent, in that event, would not be for the same invention as the surrendered original."

The original patent states the object of the invention to be a lamp which would burn without a chimney, and the entire mechanism is directed to accomplish that object. It consisted, generally, of a wick tube, with collar and plates, perforated cap for the conveyance of air, the vapor tube, and two pe-

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cularly constructed heaters, the lower one, G, provided with ribs and projections, which served as bearings upon which the upper heater, H, was placed. The two heaters are related to each other, and the entire arrangement of the two, with their various parts, is particularly described, in the specification, to be designed to supply the flame with sufficient oxygen to support proper combustion without a chimney. The invention, so far as the heaters were concerned, consisted in their joint use. The lamp of the second reissued claim is without the complex arrangement of heaters. It contains one deflector, and is the ordinary lamp, with a chimney, for burning volatile hydro carbons, *plus* the vapor tube and the perforated plate.

The specification of the original patent suggested no invention save the one contained in the entire combination. A combination of the vapor tube and the perforated plate, either with one heater, or with the other well known ingredients of a lamp, was not indicated as a distinct part of the invention. The second claim of the reissued patent describes an article materially different from the article which was originally patented. The claim contains a combination of a lesser number of ingredients than the combination which composed the original invention. One of the heaters, and all of the caps except the perforated plate, have disappeared. The deflector of this claim is not the heater, G, of the original specification, because no single deflector was therein described, except in its relation to, and as connected with, the upper heater. The two heaters are described as to be used together, and as necessarily related to each other. The whole scope and object of the invention was to produce a lamp by the combined use of the two heaters.

Had the patentee, in his original specification, suggested that a lamp containing the modified combination of the second claim of the reissue was feasible and within the scope of his invention, or that the combination of the vapor tube and the air distributor with the other well known parts of a lamp, would accomplish a beneficial result, the claim of the reissue would not have been in violation of the rule of law which has

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been quoted. But, upon the face of the two patents, I am of opinion that the claim of the reissued patent is for a different invention from any combination which is indicated or suggested in the original specification as capable of embodiment, so as to compose either an organized structure, or a distinct part of an organized structure.

A decree should be entered dismissing the bill.

John S. Beach, for the plaintiffs.

Charles R. Ingersoll, for the defendants.

JOHN W. COX vs. HIRAM BARNEY.

A judgment having been entered against a defendant, as a collector of customs, in a "charges and commissions" case, for duties overpaid, under protest, which duties had been paid into the Treasury by the defendant, and such judgment not having been paid by the Treasury Department, the plaintiff issued an execution against the property of the defendant. The defendant applied to the Court for a certificate, under § 989 of the Revised Statutes, that there was probable cause for the acts done by the collector, and for a stay of the execution: *Held*, that the application must be granted.

Such certificate may be granted by a different judge from the one before whom the verdict was rendered.

It having been the practice of defendants in like cases not to ask for a certificate of probable cause until the judgment was about to be paid by the Treasury Department, no laches or delay can be alleged against a defendant for not applying for such certificate before the issuing of an execution.

(Before BLATCHFORD, J., Southern District of New York, September 8th, 1877.)

A JUDGMENT had been entered in this case, which was one of a class of cases known as "charges and commissions" cases, against the defendant, as a collector of customs, for duties overpaid, under protest. The amount of the judgment not having been paid by the Treasury Department, the plaintiff issued an execution against the property of the defendant. Thereupon

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the District Attorney of the United States, as attorney for the defendant, moved the Court to certify that there was probable cause for the acts done by the defendant, under § 989 of the Revised Statutes of the United States, and that the execution which had been issued be stayed by the Court.

Almon W. Griswold, for the plaintiff.

Stewart L. Woodford, (*District Attorney*), for the defendant.

BLATCHFORD, J. I think that the proper construction of section 989 of the Revised Statutes is, that the amount of the recovery cannot be paid out of the Treasury, unless there is such a certificate as the section provides for. If a recovery is had, and the Court makes a certificate of probable cause, or that the collector acted under the direction of the proper officer, then there are two provisions made. One is for the protection of the collector, and the other is for the payment of the money. And the first one is not only for the protection of the collector, but it operates to restrain what otherwise would be the rights of the plaintiff. It would not be proper, however, for the Court to make an order granting a certificate of probable cause, but providing that such certificate shall not be operative unless and until the money is paid. The effect of such an order would be, to allow the execution to be issued, and to take away from the collector the protection which the statute manifestly intended to give him, that if, under the directions of the Secretary of the Treasury, he exacts money, as a public officer, and then places that money in the Treasury of the United States, his property shall be absolved from liability to respond for the exaction. He takes the office of collector under those circumstances. The person paying the exaction deals with the Government and with the collector, under those circumstances, and with the full understanding, that, if the money is exacted and is then paid into the Treasury, and the Court shall certify that the collector acted under the

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directions of the Secretary of the Treasury, he shall not have any remedy against the property of the collector. It is manifest, that the Government re-instated the right of action against the collector, for the purpose of giving to the party from whom the illegal duties should be exacted, a standing in Court to sue the collector, while it took away from him the right to obtain the fruits of his judgment by execution.

In acting upon this statute, either in granting a certificate or in restraining an execution, the Court cannot look into the question, whether the reasons for not paying the money out of the Treasury appear to be sufficient—as to whether there is a fund out of which it might be paid, or as to whether the Secretary of the Treasury ought to have paid it.

It is said, that it is discretionary with the Court to give a certificate of probable cause. It seems to me, however, that, where the collector has exacted money in the performance of his official duty, under the directions of the Secretary of the Treasury, and has paid it into the Treasury, it is the duty of the Court to grant a certificate to that effect, leaving the consequences to take care of themselves.

It is further said, that the judge who tried the case is the person to grant the certificate, and that no other judge can do so. But I think, that, although the judge before whom the verdict was rendered is not the judge to whom the application for the certificate is made, yet he can properly grant the certificate. The statute provides for the making of the certificate by “the Court,” and not by any particular judge.

The only point that is at all troublesome is the suggestion, that the application comes too late. It is clear, from the affidavits on the part of the defendant, on this motion, that the practice has grown up of not asking for a certificate of probable cause, until the time came around for the payment of the money out of the Treasury. I do not think that the plaintiff in this “charges and commissions” case is in a position to allege laches or delay, on the part of the Government or of the defendant, in applying for this certificate of probable cause.

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It is unfortunate for the plaintiff, that he is unable to obtain his money, and it is to be regretted that it is so, but it is for the legislative department of the Government to provide for the payment of the money, and the Court must assume that there is no dereliction of duty on the part of the executive officers of the Government. It is not the province of this Court to pass upon any such question. The statute is perfectly plain, and the Court ought not to wrest it from its clear meaning, on the consideration that the effect of granting the certificate of probable cause will be to relieve the executive officers of the Government from a pressure which, otherwise, would be upon them, to assist the defendant in paying the judgment. The statute looks to the exemption of the property of the collector from execution, provided he has acted under the instructions of his superior officer, and has paid into the Treasury of the United States the money which he has exacted. The ultimate means of paying back the money is another question. The statute says that it shall be provided for and paid out of the proper appropriation from the Treasury.

An execution having been issued, it seems to me that the good sense of the statute is, that no execution shall collect the debt, but that the money shall be paid out of the Treasury. Therefore, the certificate is to be granted not only to prevent the issuing of an execution against the collector, but to stay one already issued.

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vs.

WILLIS S. NELSON AND OTHERS. IN EQUITY.

THE SAME vs. WILLIAM G. GAGE AND OTHERS. IN EQUITY.

The first claim of reissued letters patent granted to John Deuchfield, January 16th, 1872, for an "improvement in cooling and drying meal," and extended, April 17th, 1872, for seven years from April 20th, 1872, (the original patent having been granted to said Deuchfield April 20th, 1858,) namely, "The arrangement and combination of the suction fan G, and the spout I, with the meal-chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F, and elevator F,' substantially as and for the purpose set forth," is not subject to the objection that it is for a different invention from that for which the original patent was issued, although the original patent claimed only a combination which embraced the elements composing the combination claimed in said first claim with other elements.

The combination of machinery for cooling meal, in the process of converting grain into flour, with machinery for preventing the waste of meal, constitutes a patentable combination, and not a mere aggregation.

A patent for a combination of old elements may be reissued for a combination of fewer elements than were contained in the combination originally claimed.

The decision in *Gill v. Wells*, (22 Wall., 11,) explained.

A patent, to be overthrown on the question of novelty, must be overthrown by clear and satisfactory proof.

A rejected application for a patent is not evidence that the thing described was ever used, nor is such description a patent or a publication, within the statute.

(Before JOHNSON, J., Northern District of New York, September, 10th, 1877.)

JOHNSON, J. The bills, in these causes, were exhibited by the plaintiffs, as assignees, for the county of Oswego, of certain reissued and extended letters patent, originally granted to John Deuchfield, April 20th, 1858, and numbered 19,984, for the term of fourteen years. The letters patent were reissued to Deuchfield, January 16th, 1872, and were extended, April 17th, 1872, for a further term of seven years from the time of the expiration of the original and reissued patent, April 20th,

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1872. The defendants are charged with infringing the first claim of the reissued patent. In defence, it is insisted that the reissued letters patent are not for the same invention as the original patent, and that new matter has been introduced into the specification, contrary to the provisions of section 53 of the Patent Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 205.) In the second place, it is claimed that the patentee was not the first inventor of what, if anything, was new in the invention claimed under the first claim of the reissued patent. This position is sought to be sustained by proof, 1st, that some one else made the invention, if any; 2d, by proof of several patents which are claimed to anticipate the Deuchfield patent; and, 3d, by proof of what is alleged to have been the prior use, in various instances, of that which is claimed as the invention of Deuchfield.

The reissued patent, number 4,712, dated January 16th, 1872, is for an alleged new and useful "improvement in cooling and drying meal," which Deuchfield claimed to have invented. The amended specification annexed thereto states that Deuchfield has "invented a new and improved arrangement of means for cooling and drying meal," and declares the invention to consist in "the peculiar arrangement of a suction fan, conveyor or conveyors, and elevators," as thereafter described, "whereby the meal, during its passage from the grinding stones to the bolts, is thoroughly dried and cooled within a limited space, the whole forming a simple and economical device." The specification is accompanied by lettered drawings, which are referred to in the description: "A represents mill-stones, and A' are the curbs. The stones are arranged in the ordinary way. B represents the bed on which the stones are placed; C represents the spouts which convey the meal from the stones; and D is a chest which is placed horizontally on the flooring, E, and with which the blower ends of the spouts, C, communicate, as shown at *a* in both figures. Within the chest, D, a longitudinal shaft, F, is placed, said shaft having a spiral flanch, *b*, on it, as shown clearly in fig. 1. The chest, D, is equal in length to the bed, B, so that all the spouts,

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C, of the several stones, A, may communicate with it. Within the chest, D, there is also placed a zig-zag partition, E, provided with openings, *c*, having slides, *d*; and with one end of the chest, D, elevators, F', communicate, said elevators discharging their contents at *e*, as shown in fig. 2. G is a fan, which is placed within a suitable box, H. The box, H, communicates with a spout, I, the lower end of which communicates with one end of the chest, D, as shown at *f*. The upper end of the spout, I, communicates with one end of a chest, J, as shown at *g*. The chest, J, contains a longitudinal shaft, K, having a screw or spiral flanch, *h*, on it, as plainly shown in fig. 1, and, within the chest J, a series of vertical plates, *i*, is placed and arranged, as clearly shown in fig. 1, to form a zig-zag passage, as indicated by arrows, 1. The end of the chest opposite to that where the spout, I, communicates, is provided with an opening, *j*. Both shafts, F, K, are rotated by any proper means, in the direction indicated by the arrows, 2." The operation is next described, as follows: "The meal passes from the stones, A, down the spouts, C, and into the lower part of the chest, D, and is conveyed by the spirally flanch shaft, F, into the elevator, F', the shaft, F, which is a conveyor, moving the meal in the direction indicated by the arrows, 3. The meal is carried up by the elevators and discharged, at *e*, directly into the bolts or into troughs, and may be conveyed by hopper-boys, or any suitable conveying device, into the bolts. While the meal is thus passed through the stones, A, spouts, C, and the chest, D, a suction blast is produced by the fan, G, said blast absorbing the moisture or vapor which the meal contains, and which is heated or warmed by the friction of the stones, A. The meal, therefore, is dried and cooled, and, in consequence of the time consumed during its passage through the spouts, C, and chest, D, will be perfectly acted upon by the blast, so that all free moisture will be absorbed. A portion of the finer and lighter particles of flour will follow the blast, and will be ejected up through the spout, I, and through the serpentine or winding-passage formed by the parts *i*, and will settle in the outer end of the chest, J, and be conveyed by the

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conveyor or flanché shaft, K, to a spout, j, through which it falls into the elevators, F', and unites with the meal which is received by the elevators direct from the chest, D." The specification proceeds: "This compound arrangement for operating on the meal while passing through the chest, D, and on the escaped flour in the chest, J, returning the latter to the elevators, while it is extremely well adapted for large flouring mills running at high speeds and with a strong suction blast, may not be either necessary or even practicable in all cases. When the grinding friction evolves only a moderate degree of heat, the chest, J, and its apparatus, may be dispensed with, for, the blast being moderated to correspond, so small a quantity of the fine flour will be drawn through the spout, I, that such flour may be ejected on the mill floor, and may be disposed of in any convenient way, so as to enter the bolts. I do not claim forcing a current of air between a pair of mill stones, while the same is in operation, for the purpose of keeping the stones in a cool state, and preventing the heating of the grain, for, such means, although not very efficient, have been previously used; but I am not aware that parts arranged as herein shown, so as to allow the meal to be subjected to the blast during its entire, or nearly entire, passage from the stones to the bolts, and insure the perfect drying and cooling of the meal, have been previously used. I claim, therefore, as new, and desire to secure by letters patent, 1. The arrangement and combination of the suction fan G and spout I, with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F, and elevator F', substantially as and for the purpose set forth; 2. The arrangement and combination of the chests, D, J, shafts, F, K, elevators, F', fan G, and spout I, substantially as and for the purpose herein shown and described."

The specification annexed to the patent as originally issued April 20th, 1858. differed in some respects from that attached to the reissued patent. In the original, Deuchfield declares himself to have invented a new and improved arrangement of means for cooling and drying meal *during its passage from*

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the grinding stones to the bolts, the underlined words being omitted in the reissue. In the original it is declared that the invention consists in the peculiar arrangement of a suction fan, conveyors and elevators. The reissue, by the insertion of the word "conveyor," in the singular, is made to read "conveyor or conveyors," and thus the way is prepared for the omission of one feature of the combination originally claimed. This severance of the combination is further prepared by the paragraph of the reissued specification, commencing with the words, "This compound arrangement," and ending with the words "enter the bolts." The proposed severance is consummated by the insertion of the first claim, under which, as framed, are claimed only "the arrangement and combination of the suction fan G and spout I, with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F, and elevator F', substantially as and for the purpose set forth." The other and original claim, now the second, embraces the arrangement and combination of both chests D and J, both (conveyor) shafts F and K, and the elevators, fan and spout connected therewith, substantially as and for the purposes therein shown and described. Under the patent as originally issued, it is, therefore, quite plain, that no infringement could be made out without showing a use of the complete combination, with all its elements, for, that was the thing patented. No device was claimed as the invention of the patentee, which entered into the combination. The invention claimed consisted only in the combination, and, in this sense, at least, it is true, that, in such a case, the combination disappears when any element is omitted, as was said by Mr. Justice Nelson in *Vance v. Campbell*, (1 *Black*, 427,) and as since has been frequently repeated.

Under the first claim of the reissued patent, if it be valid, an infringement may be made out by showing a use of the combination specified in that claim, which omits a number of elements combined in the second or original claim. Under the first claim, therefore, the operation of the reissued patent is greatly enlarged beyond that of the original patent. It,

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according to its terms, entitles the patentee to exclude everybody from using the combined elements of that claim; while the original claim would be effectual only to exclude the use by others of the elements of the first claim when combined with the other elements of the original claim. The learned counsel for the plaintiffs is, therefore, in error when he contends that the change produced by the introduction of the first claim of the reissued patent is a narrowing of the claims of the patentee, by abandoning to the public the use of a part of that which, under the original claim, was secured to the patentee. Such is not the operation or effect of that which has been done by the alteration of the specification. Under the original claim, two things were necessary to an infringement, each of which was expressed in the single original claim. Under the reissue and its first claim, one only of those two things being done works an infringement. So that the enlargement is of the right of the patentee; the narrowing is of the right of the public.

It is further claimed, on the part of the plaintiffs, that the claim under the original specification was not of a true combination, producing a result from the co-action of the elements, but that the results were the consequence of the successive and independent action of the parts, each producing its own result. In a certain sense, this would seem to be true; because, the cooling of the meal may be conceived of as one independent result, and the saving and restoring to the common mass that part of the meal which, in the cooling process, has been mechanically separated from the rest, may, also, be conceived of as another independent result. But, this, in my opinion is an over-refinement, not required by the principles of the patent law. When regarded as part of a practical improved arrangement of means for converting grain into flour, both results, the cooling and the saving, contribute to the one common result—cooling without waste, and thus getting the largest practicable amount of merchantable flour. It cannot be doubted, that, if the whole process of reducing grain to flour were new, the complete machinery employed, even in-

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cluding the combined Deuchfield device, could be included and maintained in a single patent, or in a single combination. This view is, as I understand it, supported by the decision of Mr. Justice Curtis, in *Forbush v. Cook*, (20 *Law Reporter*, 664,) cited in *Curtis on Patents*, (§ 111, note 2.) The learned Judge says: "To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elementary parts may be made." In the original arguments on the part of the plaintiffs, the combination was sought to be sustained as a patentable combination; but, in the further argument, the attempt is made to treat this arrangement of means claimed in the original patent, and in the second claim of the reissued patent, as not patentable, upon the ground that it constitutes only an aggregation of several results, within the doctrine of *Hailes v. Van Wormer*, (20 *Wallace*, 353, 368,) and *Reckendorfer v. Faber*, (2 *Otto*, 347;) but, what has been already said on that topic seems to me to be sufficient to show, that the combination for which the original patent was granted was not liable to the objection, that the results of the combination were an aggregate of separate results, and not the joint product of the several elements of the combination. The case is one not of juxtaposition merely, but of combination, in the sense of the law.

The next question to be considered is that which arises upon the consideration of the two patents, with their specifications and drawings—whether the reissued patent is for the same invention as that for which the original was issued, and thus within the authority of the Commissioner of Patents, under section 53 of the Patent Act of 1870. That the original patent was inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee

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claiming, as his own invention or discovery, more than he had a right to claim as new, and that the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, has been conclusively established by the action of the Commissioner, to whom alone the decision of these questions belonged. *Seymour v. Osborne*, (11 Wall., 516, 543 to 545.) But, this decision leaves undetermined the question whether "there is such a repugnancy between the old and the new patent, that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced in the original patent." I purposely omit the additional word used in the decision cited, which says, "embraced and secured in the original patent," because, one of the very plain grounds of reissue specified in the statute is, that the original patent fails to secure the invention, by reason of the imperfection of the claim or description of the invention. (*Curtis on Patents*, § 282 b, note 1, and cases there cited.) Moreover, the statute, in the section cited, allows the new patent to be issued with corrected specifications, and, in case of a machine patent, reference to be had, for this purpose, to the drawings and model, the only prohibition, in that behalf, being, that they may only be amended by each other. There is, also, a general prohibition, that no new matter shall be embraced in the specification. A further provision is made, that, where there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention. It results, from these provisions, taken together, that what is found in the specification drawing or model of the original patent may be embraced in the reissued patent, (*Seymour v. Osborne*, 11 Wall., 516;) and that, in redescribing his invention, the patentee is not rigidly confined to what was described before, but may include in the new description whatever else was suggested or substantially indicated in the old, provided it was embraced in the invention as actually made and perfected. Differences in the description and claims of the old and the new specifications are not the

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tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject matter of the original patent is preserved. Within this range, whatever change is required to protect and effectuate the invention is allowable. (*Parham v. Am. Buttonhole Co.*, 4 *Fisher's Pat. Cases*, 468; *Battin v. Taggart*, 17 *How.*, 74.) In the case of *Stevens v. Pritchard*, (10 *Off. Gaz.*, 505,) Mr. Justice Clifford has stated the doctrine with great clearness and precision, so as to afford a plain guide in the application of the law as to reissues. The learned Justice says: "Reissued patents are presumed to be for the same invention as the original, unless the contrary appears. Matters of fact are not open, under such an issue, in a suit for infringement. Instead of that, the conclusion in such case must always be in favor of the validity of the reissued patent, unless it appears, upon a comparison of the two instruments, that the reissue, as matter of legal construction, is not for the same invention as the original. Surrenders are allowed, in order that what was imperfect before may be made perfect, and in order that what was before ambiguous may be made clear and certain; and, for that purpose, the patentee may add whatever was substantially suggested or indicated in the original specifications, drawings, or Patent Office model. New features may not be introduced, for the reason that every interpolation of the kind is forbidden by the Act of Congress. Errors and defects may, however, be corrected, under the conditions specified; and the prohibition, that new features shall not be introduced, must not be understood as taking away the right to include in the reissue whatever was substantially suggested or indicated in the surrendered specifications, drawings, or Patent Office model."

In the case now before the Court, the drawings attached to the reissued patent are the same as were annexed to the original. The mechanical structure, so far as the machine comes under the first claim of the reissue, is exactly the same as was described in the original specification, up to that point. Nor is anything added to the description of the further me-

chanical structure of the machine, as originally described. Looking at the mode of operation of the machine as set forth in the original specification, the reissued patent makes no alteration in it, so far as the machine falls under the first claim of the reissue. The whole controversy upon the question turns upon this. The mechanical arrangements are all unchanged; the mode of operation of the several parts is correctly described; the results of the action of the whole are correctly stated; and it is obvious, that, while the combined action of all the parts produces the complete result, yet the mere cooling and drying of the meal is the result of that part of the machinery which is now covered by the first claim of the reissued patent. All that has been added is the new claim, which embodies in words that which the specifications and drawings could not fail to disclose to any intelligent examination. The verbal addition to the specification, of the paragraph which declares that the collection of the separated fine part of the meal and its return to the general mass may or may not be made, as circumstances make desirable, is not, in my opinion, new matter, within the prohibition of the statute. If, to the original specification, only a new claim had been added, substantially like that which forms the first claim of the reissued patent, the legal effect of the original patent would have been the same as that now asserted for the reissued patent. The remarks with which Mr. Justice Clifford commences his opinion, in the case, already cited, of *Stevens v. Pritchard*, I think, substantially sustain this view. The learned Justice says: "Cases arise where a patentee, having invented a new and useful combination, consisting of several elements which, in combination, compose an organized machine, also claims to have invented new and useful inventions, consisting of fewer numbers of the same elements, and, in such cases, the law is well settled, that, if the several combinations are new and useful, and will severally produce new and useful results, the inventor is entitled to a patent for the several combinations, provided he complies with the requirements of the Patent Act, and files in the Patent Office a written de-

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scription of each of the alleged new and useful combinations, and of the manner of making, constructing and using the several inventions. He may, if he sees fit, give the descriptions of the several combinations in one specification, and, in that event, he can secure the full benefit of the exclusive right to each of the several inventions, by separate claims, referring to the specification for the description of the invention, without the necessity of filing separate applications for each of the inventions. Separate descriptions of the respective inventions in one application are as good as if made in several applications; but the claims must be separate, and it would follow, that, if the patentee, by inadvertence, accident or mistake, should fail to claim any one of the described combinations, he might surrender the original patent and have a reissue, not only for the combinations claimed in the original specification, but for any which were so omitted in the claims of the original patent." For this proposition is cited as authority the case of *Gill v. Wells*, (22 Wall., 24.) It is mainly upon what is said in that case that the defendants rely to sustain their proposition that the reissued patent is void, as not for the same invention as the original patent. The position is this, that, where a patent is for a combination of old elements producing a new and useful result, the invention consists only in the combination, and, therefore, when one element is relinquished, the combination being gone, the invention is gone likewise. This proposition is, in a certain sense, true and accurate, in reference to a patentee of such a combination bringing an action for an infringement. There is no infringement when all the elements are not employed, leaving out of view the consideration of equivalents, which, for the present purpose, is not material. Numerous cases sustain this view, and the law is unquestioned. (*Vance v. Campbell*, 1 Black, 427; *Prouty v. Ruggles*, 16 Peters, 336; *Gould v. Rees*, 15 Wall., 187; and many other cases.) But, upon the doctrine of these cases in respect to actions for infringements, it is sought to establish a distinction between patents for combinations of old elements and all other patents, in regard to reissues.

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sues, and to deny the power to reissue such a patent for a combination of any fewer elements than were contained in the original combination. Now, the Patent Act makes no such distinction. Its terms are general and relate alike to all patents. The position is set up and rests upon this argument: The reissue must be for the same invention; this consists in the combination, which disappears when one element is omitted. But, this argument, true or unsound, does not apply to a case in which, among the old elements, some are single and some are sub-combinations, entering into the general and larger combination. This doctrine was necessarily affirmed, because acted upon in judgment, in *The Corn Planter Patent*, (23 *Wallace*, 181.) To the opinion of the majority of the Supreme Court in that case was opposed the able statement of the learned judge who delivered the opinion of the Court in *Gill v. Wells*, (22 *Wall.*, 1,) of the grounds on which he had, in that case, maintained the view that is now sought to be applied to and to control the decision of the present case. But the majority of the Court did not apply those views to the decision of *The Corn Planter Case*, but held that the reissues were for things contained within the machines and apparatus described in the original patents, and were, therefore, not subject to the objection of diversity of invention.

In *Gill v. Wells*, (above cited,) the reissues omitted one well described ingredient of the patented combination, and substituted in its place several other devices, not equivalent for the omitted element, nor claimed to be such, and the Court held that this was inadmissible, and that the reissues were not for the original invention.

The case of *Campbell v. Vance*, (before cited,) does not, as a judgment, settle any doctrine material to the question of reissues. There was no reissue in the case, and the decision granting a new trial was put upon the ground that the plaintiff had been improperly excluded as a witness.

In *Russell v. Dodge*, (3 *Otto*, 460,) the only point decided was, that the alleged invention or inventions contained in the original and reissued patents lacked novelty, and were, therefore, not patentable.

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After a careful examination of all the cases which have been cited, I am of opinion, that, upon a comparison of the original and reissued patents, it cannot be held, as matter of legal construction, that the reissued patent is for an invention not contained in the original patent, and that the reissued patent is, therefore, not void upon that ground. The decision of the Patent Office in granting the reissue covers the grounds of fact upon which the action of the Commissioner could, in the proceedings before him, have been contested.

The reissued patent being valid upon its face, the presumption is, that the patentee was the first inventor of that which the patent purports to secure. (*Seymour v. Osborne*, 11 Wall., 516; *Tucker v. Tucker Man'f'g Co.*, 10 Off. Gaz., 464, Clifford, J.) And this is not a mere formal presumption, but, if to be overthrown by parol testimony, must be overthrown upon clear and satisfactory proof. A case of doubt upon the evidence is not enough, for that leaves the presumption operative. (*Brady v. Atlantic Works*, 10 Off. Gaz., 702.)

The prior patents adduced by the defendants to show an anticipation of the plaintiffs' invention do not appear to me, in their principles and modes of operation, to approach near enough to the plaintiffs' invention to require particular comment. No one of them shows a current of air created by a suction fan, and drawn through the opening of the mill stones, down the meal spouts, and into and along the enlarged meal box shown in the drawings, and the conveyor shaft, and accompanying the meal in its progress to the elevators, and, by its operation, taking away the heat and moisture of the meal, which is the substance of the plaintiffs' invention.

The rejected application of Mann for a patent is not to be considered as a bar to the patent represented by the plaintiffs. (*The Corn Planter Patent*, 23 Wall., 181.) Assuming its similarity to the Deuchfield device, the rejected application does not make out that the thing described was ever used; nor is such a description a patent or publication, within the statute.

The defence of want of novelty, by reason of the alleged

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prior invention by one Stryker, does not appear to me to have any serious basis. The story which he tells of Deuchfield's application to him, at a grocery store, on a Sunday evening, February 1st, 1857, to contrive some way of keeping the mill (the Uhlhorn) dry, that, after a brief conversation, Deuchfield employed him to come on the next day, to begin the work, and that, on the Monday morning, he went to the mill and made the drawing which he produces, dated and signed by him on that day, as he testifies, and then proceeded with the work, having, as his guide, this working drawing, which represents the mill as having five run of stones, while, upon the overwhelming proof, it never had but four, makes a story incredible enough, upon the face of it, to be disbelieved. But, it is shown to be necessarily untrue, by the evidence of several persons with whom Deuchfield had previously conversed respecting a plan which he had devised for drying the meal and thus freeing the mill from the injurious effect of moisture, and, also, by his consultation with the owners of the mill, and the final consent on their part that he might proceed to put in the contrivance which he had devised, as he proceeded to do on the 2d of February, 1857, employing Stryker for the purpose. It is true, that Deuchfield was not called as a witness, but the proof shows that he was a man broken in health and aged at the time of the examination, and, as there was other independent proof upon the point, satisfactory in character, the omission is not material. It only calls for close scrutiny of the question.

The other questions of anticipation rest upon oral proof, either of the time when certain contrivances were introduced into particular mills, or of the substantial identity of such devices with that covered by Deuchfield's invention.

I am satisfied, upon the most careful examination which I am capable of, that, in each case, the weight of the oral evidence is with the patentee, and that, without the presumption arising from the patent, I should be constrained to hold, upon these questions, with the plaintiffs. But, I can with difficulty understand how it can be supposed, that, in any of the cases

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of alleged anticipation, the proof for the defence can be taken to go beyond a case of doubt; and, in such a case, the presumption arising from the patent must stand. To discuss these several questions in detail can be of no public service, and I have not the time to devote to it.

The infringements by the defendants are clearly made out by the testimony on the part of the defendants, as well as by that of Bignall on the part of the plaintiffs. In each case, the first claim of the reissued patent is infringed by devices, in all material respects, like those contained in the reissue, and embracing all the elements of that combination. That the defendants have added something to the devices combined by the patentee does not enable them to use his combination without being answerable.

A decree in favor of the plaintiffs must be made in the usual form, restraining further infringement, establishing the reissue, and directing a reference to a master to take an account and ascertain the profits made by the defendants, and the damages suffered by the plaintiff, by reason of such infringements. Either party has leave to apply for further directions, and, upon the coming in and confirmation of the master's report, for a final decree.

George F. Comstock and James A. Allen, for the plaintiffs.

Henry R. Selden, for the defendants.

ISAAC EPPINGER

vs.

HENRY A. RICHEY AND JOHN J. BONIFACE. IN EQUITY.

The letters patent granted to Isaac Eppinger, June 17th, 1878, for an "improvement in plug and bunch tobacco," are valid.

The claim of said patent, namely, "Plug or bunch tobacco made as herein de-

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scribed, the same consisting of a rope or strand, composed of a sweetened or prepared filler, inclosed in a binder, in turn enveloped in a wrapper, the said rope being coiled around a central core, forming a continuous part of the rope, and the bunch thus made being subjected to a pressure, as and for the purposes set forth," claims a patentable invention.

The peculiarity of the invention is in the form and shape of the coil, and the change required invention, and the article produced is a new and useful article of manufacture.

(Before SHIPMAN, J., Southern District of New York, September 11th, 1877.)

SHIPMAN, J. This is a bill in equity to restrain the defendants from the infringement of letters patent, dated June 17th, 1873, for an "improvement in plug and bunch tobacco." The infringement is admitted. The novelty of the alleged invention and its patentability are denied.

Licorice, or some other moist and sweet substance, is used in the manufacture of plug or bunch chewing tobacco, in order to impart moisture and sweetness to the manufactured article. The preservation of these two qualities is greatly desired by the consumer. When tobacco is thus prepared, there is danger that the moist tobacco, if exposed to the air, will ferment, or will mould and "dry rot." It is, therefore, important to make the plug or bunch as compact as possible, in order to preserve moisture and to prevent mould. Before the date of the invention, this kind of chewing tobacco was made by enclosing strands of sweetened "filler" tobacco in a binder. The wrapped tobacco was then spun upon a wheel, or twirled or rolled by hand into a roll, and, after being encased in a wrapper, was coiled and packed for market, or was subjected to extreme heat, and afterwards to pressure, before being put up in packages. Moisture was removed by this "hot house" process, and thus danger of fermentation was obviated, but the quality of the tobacco was made inferior. Another method of manufacture was by encasing the sweetened filler strands in an unsweetened binder, and, also, in a wrapper. The rope was then bent and braided, and the two ends of the braid were fastened by a cap of wrapper tobacco. The braids were subjected to sidewise pressure, but could not be subjected to pressure endwise, in consequence of their shape, and, there-

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fore, were not compressed sufficiently to exclude the air, and the tobacco was liable to become mouldy. Each braid soon became quite dry in the pocket of the consumer, and lost its flavor.

The patentee gives, in his specification, the following description of the patented improvement. "My improved mode of manufacturing plug or bunch tobacco, of the kind above stated, consists in forming the strand of "filler" tobacco, which is treated with licorice or other sweetening substance, in the usual manner. I envelope this filler in a "binder," which is a brighter and larger leaf, and around the binder I wrap what is called a "bright wrapper leaf," which is used in its natural condition, without treatment. The rope thus formed is, in fact, a long flexible cigar, with a sweetened filler. It is dry and clean on the exterior, the binder effectually isolating and separating the filler from the exterior wrapper. It does not require to be sweated, and it can be shipped and transported for long distances by water or land conveyance, without danger of moulding or spoiling. The wrapper is of little use for chewing purposes. Therefore, in order to make good chewing-tobacco, the filler and binder should be of such proportions to the wrapper, that, while the wrapper will suffice as a protector and preserver of the filler, there will be no appreciable loss in the plug or bunch, for chewing purposes. In Figure 1 is shown a rope or strand such as I have described, *a* being the filler, *b* the binder, and *c* the wrapper. The rope or strand thus made is coiled into a bunch around a central core, one end of the rope, either single or doubled, serving for the core, and the remainder of the length being coiled around this coil, as represented in Fig. 2, the central core *d* and external coil *e* being thus in one piece, and constituting part of the same continuous strand or rope. The coil or bunch thus made by hand is not, however, completed, nor is it fit for sale or use, being loose and unfinished in appearance and condition. The next step is to finish it, which is effected in the polishing-pot or finisher—a strong receptacle of suitable shape and size to contain a number of plugs, pro-

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vided with a follower forced down upon the plug or plugs in the pot by hydrostatic pressure or other sufficiently powerful agency. The bunches are first placed in the pots on end, and the follower is then forced down with great pressure upon them. After being allowed to set for about twenty minutes, the follower is removed and the bunches are taken out and replaced in the pot on their sides, and side by side, and pressed again in like manner. They can then be pressed on their edges, but this, however, is optional, and not absolutely necessary, as the two pressings have compacted and solidified the plug sufficiently for all ordinary purposes. The plug thus compacted is represented in Fig. 3, and is ready for packing. In conclusion, I wish to state that I do not here broadly claim plug or bunch tobacco put up in coils with a central core and then subjected to pressure; nor do I claim, separately, the combination of a filler, binder and wrapper." The claim of the patent is for "plug or bunch tobacco made as herein described, the same consisting of a rope or strand, composed of a sweetened or prepared filler, inclosed in a binder, in turn enveloped in a wrapper, the said rope being coiled around a central core, forming a continuous part of the rope, and the bunch thus made being subjected to a pressure, as and for the purposes set forth."

The advantages of this improved or new article of manufacture are very marked. The moisture of the tobacco is preserved. Air and dampness are excluded by the compactness into which the tobacco is pressed. It can be shipped to warm or damp climates without liability to deterioration by mould, and a single coil can be carried in the pocket of the consumer without becoming dry or friable. The article has had a very large sale, and has commanded a much higher price than the same quality of tobacco when put up in any other form. The price of the patented article has been 51 or 52 cents per pound, exclusive of Government tax, while the same qualities of twist or braid tobacco are sold at 27 cents per pound, exclusive of tax. The utility of the article is indicated by its remarkable success as an article of merchandise—a success which is not attributable to the quality of

the tobacco of which it is composed, or to the novelty of the style of manufacture, but to the inherent advantages which it possesses in the particulars which have been mentioned.

The novelty of the invention was clearly proved. It manifestly differs from the ordinary spun or rolled plug tobacco in this, that, in such tobacco, the filler and binder are rolled together, while in the patented article the binder simply encircles the filler. "Twist," or "braid" tobacco was made in the same manner as the patented article is made, by encircling the sweetened filler with two separate wrappings of unsweetened tobacco, but twist tobacco is simply braided and subjected to lateral pressure. Each plug is a flat braid, into the interstices of which air freely enters, and, having a comparatively thin and flat surface, the plug cannot be made compact by endwise pressure. The shape and the method of the formation of the coil, which render endwise pressure practicable, and which enable the coil to be compactly compressed without injury to the strands of the filler, constitute the particulars in which the patented article differs from braid tobacco.

The important question which arises in the case is as to the patentability of the invention. A rope of strands of sweetened filler, inclosed in a binder, which in turn is enveloped in a wrapper, ante-dated the patent, and is disclaimed. Plug tobacco had always been coiled and braided in various forms and had been subjected to pressure. The peculiarity of the invention is in the form and shape of the coil. Can any particular method of coiling, although both endwise and side-wise pressure are thereby made available for the purpose of excluding air, and although the method enables the consumer to use the whole coil in its desired state of moisture, be the subject of a valid patent? The argument of the defendants' counsel is, that the combination of filler, binder and wrapper is old and is disclaimed, which is true; that subjecting a coiled rope of such tobacco to pressure is old and is disclaimed, which is true; that coiling or twisting a moist rope of tobacco has always been practised, which is, also, true; that the partic-

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ular form of the coil is a matter of fancy; and that the form of the coil cannot involve the exercise of the inventive faculty. This is the precise question which is at issue.

The article of plug tobacco has been long in use, and has been in constant demand. As it has been prepared for market, it has been liable to spoil in warm and damp weather, and to grow mouldy in any temperature. It is fair to presume that the ingenuity of tobacco manufacturers, and of tobacconists, has been exercised in an attempt to find a remedy for this liability to pecuniary loss. The evils were notorious, but no remedy was found until this invention was made. If the remedy consists in the shape of the coil, and if the particular twist of the coil requires no greater exercise of the inventive faculty than is involved in the shape of a bow into which a ribbon may be twisted, it is strange that an evil which had long existed had not previously been avoided. Two facts exist in this case. One is, that an important improvement has been attained. The second is, that the improvement is in a staple article, which has been manufactured in this country for a long series of years. Without the testimony of the patentee and the first manufacturer in regard to the number of experiments which were required before the invention was hit upon, and in regard to the difficulty which was experienced in perfecting the manufacture, it is manifest, from the length of time during which tobacco has been manufactured, from the constant demand for it, and from the well-known evils to be overcome, that the inventive faculty must have been brought into exercise, or else that mechanical skill would long since have avoided any danger of fermentation or mould. The utility of the patented article has been evinced by its large sales, and by the unanimity with which rival tobacconists have commenced its manufacture. The inventor evidently gave to the public an article which it wanted, and which it had not previously known. Without giving to the general use of the invention, as a test of its patentability, any greater importance than the Supreme Court, in the case of *Smith v. Good-year Dental Vulcanite Co.*, (3 Otto, 486,) indicate should be

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given to this circumstance, I am of opinion, that the facts in the case fully establish the conclusions, (1,) that, however simple the change in the method of manufacture apparently may have been, yet it was a change which required invention for its accomplishment; and, (2,) that the improvement resulting from the changed method of manufacture has been so great, that the article which is produced is, within the meaning of the Patent Acts, a new and useful article of manufacture.

Let there be a decree for an injunction and an account.

Benjamin F. Lee, for the plaintiff.

Samuel J. Glassey, for the defendants.

JACOB G. NEAFIE AND OTHERS

vs.

CHARLES A. CHEESEBROUGH.

An order of reference, made on consent, in an action at law, provided that the cause be referred to H. to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the Court, and that, on filing such report with the clerk of the Court, judgment be entered in conformity therewith, "the same as if the cause had been tried before the Court." On the report, judgment was entered for the defendant, for costs. The plaintiff moved for a stay of proceedings, under § 987 of the Revised Statutes, with a view of applying to the Court to grant a new trial: *Held*, that the Court had no power to grant a new trial.

(Before BENEDICT, J., Eastern District of New York, September 11th, 1877.)

BENEDICT, J. This case comes before the Court upon a motion for a stay of proceedings, after judgment entered. The case, which is an action at law, was referred by consent, and has been heard and determined by the referee. Upon the referee's report, judgment has been entered in favor of the

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defendant, for \$155 80, costs. The plaintiffs desire to apply to the Court to grant a new trial, and, for that purpose, now move for a stay of proceedings, under section 987 of the Revised Statutes. The defendant objects to the stay, upon the ground that the Court has no power to grant a new trial after judgment entered upon the report of a referee, made upon such a consent as was given in this case.

The objection of the defendant appears to be well taken. The consent under which the reference was ordered, and to which the order of reference conforms, provides, that the cause be referred to Henry E. Howland, to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the Court. According to this consent and order, the decision of the referee, and not the decision of the judge, is to determine the judgment to be entered. That such a reference may be made has been expressly decided by the Supreme Court, (*Heckers v. Fowler*, 2 Wall., 123;) but I find no authority to grant a new trial, after judgment has been duly entered upon the report of a referee authorized to hear and determine the cause.

It is supposed by the counsel for the plaintiffs, that section 987 of the Revised Statutes confers upon the Court the power to grant a new trial after judgment, in all cases when the trial is by the Court, and he contends, that, inasmuch as, in this case, the consent and order of reference provide, that, on filing the report of the referee with the clerk of the Court, judgment shall be entered in conformity therewith, "the same as if the cause had been tried before the Court," therefore, the power to grant a new trial after judgment exists here, by virtue of section 987. But, this provision in the consent and order merely relates to the action of the clerk in entering judgment as of course, upon the referee's report, without application to the Court. It does not change the character of the proceeding, nor make the trial other than a trial before a referee instead of the Court. It cannot have the effect to bring the case within the scope of section 987, for, plainly, there has been neither a verdict nor a finding of the Court upon the facts.

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My conclusion being that the Court has no power to grant a new trial, it follows that the stay asked for cannot be granted.

Augustus C. Fransioli, for the plaintiffs.

Frank E. Blackwell, for the defendant.

THE GOULDS MANUFACTURING COMPANY

vs.

JOHN P. COWING AND OTHERS. IN EQUITY.

In *Goulds M'f'g Co. v. Cowing*, (12 Blatchf. C. C. R., 248,) it was held, that the invention covered by the plaintiff's patent was of an improvement in a pump, and that, as the plaintiff had failed to show the profits or damages arising to the defendants from the use of such improvement, it was entitled to only nominal damages. On further evidence being given, showing that, after the plaintiff's pump had been introduced into certain oil regions, other pumps could not be sold in those regions: *Held*, that such further evidence did not show that the plaintiff was entitled to other than nominal damages.

(Before JOHNSON, J., Northern District of New York, September 14th, 1877.)

JOHNSON, J. This case comes up on exceptions, taken by the defendants, to the report of the master under the interlocutory decree, directing an account upon the infringement of the plaintiff's patent. This decree was made in March, 1874, Judge Woodruff presiding. Under it an account was taken before Mr. Pomeroy, acting as master. Upon his report exceptions were taken by the defendants, which were heard before Mr. Justice Hunt. The learned judge allowed the exceptions, and, in the first instance, ordered that the plaintiff was entitled only to nominal damages, but subsequently allowed the plaintiff a further opportunity to produce evidence. Upon the decision of the case, an elaborate opinion

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was delivered, which is to be found in 12 *Blatchf. C. C. R.*, 243. It was held, that the invention was one only of an improvement in the pump, and not of the entire pump; that numerous parts of the pump were in general use prior to the patent, and were not claimed therein, and were free to be used by the defendants; that the patented invention claimed was a special construction of a side chamber, whereby the same was adapted to use with the valve casings bolted on the outside; and that the damages could not exceed the profits upon such improvement. It was further held, that, as the plaintiff failed to show the profits or damages arising from the use of the improvement, the master should have decided that nominal damages only could be recovered. This decision furnishes the law of this Circuit upon the questions involved, and, in an especial sense, it furnishes the law of this case, which no judge has a right to review or modify, except upon appeal. Being convinced of its correctness, I have as little inclination, as I have right, to depart from it. Upon the further reference, the report upon which is now before the Court, on exceptions taken by the defendants, the clerk of this Court, acting as master, has made substantially the same report as was made by the first master, founding his decision upon proof that, after the plaintiff's pump had been introduced into certain oil regions, other pumps could not be sold in those regions. This is relied upon as taking from the former decision all its force, and absolving the party from the necessity of giving proof, as that decision holds, of the profits or damages arising from the use of the improvement. The force of the former decision cannot thus be avoided. The fact newly introduced has no bearing upon the question, but leaves the rule announced in the former decision of Mr. Justice Hunt, uncomplished with. The attempt to get rid of that decision in this way must necessarily fail. To a Court which has decided that evidence of a particular fact is necessary, it is no answer to say that it cannot be given. The consequence of that state of things is, that the party on whom the burthen rests must fail. This is the situation of the plaintiff in the case before the Court. It has

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not given the evidence which the Court has held it must give, to entitle it to more than nominal damages. This must be attributed to the impossibility of proving any damages within the rule laid down by the Court. The exceptions must be allowed, and the report reduced to nominal damages, and there must be a final decree on that basis. If the views of the plaintiff are to prevail, the only remedy is in the Supreme Court, upon appeal. To the decision of Mr. Justice Hunt heretofore made in this cause, is now to be added the decision of the same learned judge, made in this Court, in *Black v. Munson*, (*ante*, p. 265,) in which the same doctrine laid down by him in this case is reaffirmed, and applied to the circumstances of *Black v. Munson*. Let there be a decree for the plaintiff, with nominal damages only.

J. B. Perkins, for the plaintiff.

Elisha Foote, for the defendants.

FRANCIS O. BOYD AND ANOTHER, CLAIMANTS OF 50 BARRELS
OF COLOGNE SPIRITS, PLAINTIFFS IN ERROR

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

The term "distilled spirits," as used in §§ 3289 and 3299 of the Revised Statutes, includes all spirits which have been distilled, whether they have been subsequently rectified or not.

The fact that a person has, in good faith, made advances upon distilled spirits, is no defence to an action for their forfeiture under those sections.

(Before JOHNSON, J., Southern District of New York, September 15th, 1877.)

JOHNSON, J. The principal question in this case arises upon the exceptions to the charge of the judge at the trial, declaring the construction and meaning of two sections of the

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Revised Statutes, numbered 3289 and 3299. The former reads as follows: "All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark or stamp required therefor by law, shall be forfeited to the United States." The latter is in these words: "All distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States." The Judge ruled, that "distilled spirits," under each of these sections, meant and included all spirits which had been distilled, whether subsequently rectified or not; and to this the claimants excepted. The case was then submitted to the jury, who found for the United States. It is to be assumed that the charge was, in all other respects, correct, since its substance is not stated, and the only exception to the charge is that already set forth. Obviously, distilled spirits do not lose that character by undergoing a subsequent process of rectification, either in the ordinary form of the words, or under the meaning of the term, as employed in section 3248 of the Revised Statutes, where distilled spirits are described or defined. But, nevertheless, if the context made it clear that the term was used in a restricted sense, and in contrast with the term "rectified spirits," it would be the duty of the Court to carry out the legislative will. In several of the sections of the chapter in question, (*chapter 4 of title 35,*) the term is unquestionably used in the general sense, embracing all sorts of distilled spirits. For instance, in section 3312: "All stamps required for distilled spirits shall be engraved, in their several kinds, in book form, and shall be issued by the Commissioner of Internal Revenue to any collector, upon his requisition." Each stamp is to have an engraved stub, and a number thereon, corresponding to that on the stamp. The stub is not to be removed from the book, and upon it memoranda are to be made, so as to preserve a perfect record of the corresponding stamp. These provisions are general, and relate to every sort of stamp for distilled spirits, rectified or not. So, in section 3316, which relates to the affixing or cancelling any stamp relating

to distilled spirits, provided for by law, and to the affixing, or permitting to be affixed, any such stamp to any cask or package of spirits, of which the whole, or any part, has been distilled, rectified, compounded, removed or sold, in violation of law, it is obvious, that the term "distilled spirits" covers them in all states, rectified, compounded, or only in their first condition. In section 3327, regulating the time of day for the removal of distilled spirits, they are forbidden to be removed from the building in which the same may have been distilled, redistilled, rectified, compounded, manufactured or stored, which plainly includes every kind of spirits which have once been distilled, no matter what other operation they may have been subjected to. In section 3323, it is provided, that all distilled spirits drawn from one and put in another package, shall be regauged; and that the new package shall be marked or branded with the particular name of such spirits, as known to the trade, and with the name and place of business of the dealer or rectifier, as the case may be, and, except where such spirits have been rectified or compounded, with the name of the distiller, &c., and, where they have been rectified, with the name of the rectifier, &c. Various other instances might be referred to, but I think these are sufficient to establish the position, that, in this chapter, the term "distilled spirits" includes that substance in each of its forms, and includes as well rectified as non-rectified spirits, unless, in the particular provision of the law, some repugnancy appears from attributing this sense to the words. Nothing of that sort appears in either of these sections. In section 3289, the marks and stamps required therefor by law, are either those required before rectification, or those peculiar to rectified spirits, according to the fact. But, the command of the section is not complied with when it appears that the marks and stamps have been fraudulently and unlawfully applied, contrary to the provisions of the statute; as, for instance, if it appears that a package bears rectification stamps unlawfully issued in blank, and not filled up by the proper officer, or, if the package appears under such stamps, when, in fact, it has not borne those stamps appropriate to it

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before rectification. These remarks are, perhaps, not necessary to the decision of this cause, the point raised upon the charge relating only to the question whether distilled spirits include rectified spirits. The other section applies to rectified spirits as well as other distilled spirits, though the proof of their identity, and that they have not been removed according to law, may be difficult, even with the aid of the presumption created by section 3334. (*United States v. 508 Barrels, 5 Blatchf. C. C. R.*, 407; *United States v. 6 Barrels, Id.*, 542.)

The only other question which I deem it necessary to advert to, is that urged by the claimants, that they were *bona fide* purchasers, having made advances in good faith upon the spirits in question. The case of *Henderson's Spirits*, (14 *Wallace*, 44,) seems to me to establish that no question of *bona fide* enters into the case. The forfeiture declared by the Act of Congress cannot be thus defeated. It is absolute; and it does not lie with the Court to modify the severity of the statute, by its ideas of what would be just to the party suffering loss in the particular case. The case of *United States v. 100 Barrels*, (23 *Int. Rev. Record*, 10,) decided in the Maryland District, both in the District and Circuit Courts, does not, as I understand it, upon a view of the plea demurred to, involve anything more than the construction of the statute under which the forfeiture was incurred. That statute extended the forfeiture happening upon a certain fact, to all spirits received by the party guilty of that fact. The plea was, that, at the time of the seizure, the property was owned by the claimant, and not by the person charged with committing the fact creating the forfeiture. This plea was sustained upon demurrer, and the decision only determined that ownership at the time of the seizure, by the guilty party, was necessary to bring the property within the operation of the clause of forfeiture.

The other questions do not seem to me to need any special notice, and the decisions on them were, in my opinion, correct.

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The judgment must be affirmed, with costs.

George W. Cotterill, for the plaintiffs in error.

Roger M. Sherman, (*Assistant District Attorney*), for the defendants in error.

THE UNITED STATES, PLAINTIFFS IN ERROR

vs.

ALOIS FEIGELSTOCK, CLAIMANT of 50 BARRELS of DISTILLED SPIRITS, DEFENDANT IN ERROR.

Under § 3242, of the Revised Statutes, a person does not carry on the business of a wholesale liquor dealer without having paid the special tax as required by law, who, without having paid such special tax, sells, in quantities of not less than five wine gallons at one time, a single lot of spirits which he has taken for a debt.

Under that clause of § 3281 of the Revised Statutes which provides for the forfeiture of distilled spirits, the forfeiture does not operate when the statute is violated, but only at the time of the seizure of the spirits or wines.

(Before JOHNSON, J., Southern District of New York, September 15th, 1877.)

JOHNSON, J. This case comes here upon a writ of error to the District Court, to review its judgment, in an information of forfeiture, given upon the verdict of a jury against the plaintiffs, by direction of the judge, at the trial. A bill of exceptions, taken by the United States, presents the questions on which a reversal is asked. The first arises upon the facts, that one Kingston was a creditor of the Bingham, who were distillers in Patoka, Indiana, for goods sold, and for services rendered, and for money lent by him to them; that the spirits seized were, on the 10th day of May, 1875, sold and transferred by the Bingham to Kingston, on account of that indebtedness; that Kingston assumed control of the spirits,

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and procured them to be shipped from Patoka to the city of New York, and authorized Feigelstock, a wholesale liquor dealer, and the claimant, to sell the same on account of Kingston, in quantities of not less than five wine gallons at one time; and that Kingston did not pay the special tax payable, by the laws of the United States, by a wholesale liquor dealer. Upon these facts, it is claimed by the United States that the spirits seized were forfeited, under section 3242 of the Revised Statutes. But, the forfeitures created under that section are denounced against every person who carries on the business of a wholesale liquor dealer without having paid the special tax as required by law. This provision is found in chapter 3, of title 35, entitled "special taxes." Section 3232, which begins the chapter, enacts, that no person shall be engaged in, or carry on, any trade or business thereafter mentioned, until he has paid a special tax therefor, in the manner thereafter provided. Section 3244 provides, that "special taxes are imposed as follows: 'Fourth. Wholesale liquor dealers shall pay one hundred dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, or wines, in quantities of not less than five gallons at the same time, shall be regarded as a wholesale liquor dealer.'" Taking the language of these sections together, it is plain, that those persons only are included who engage in, or carry on, a trade or business of liquor dealing, and that it does not apply to the case of an isolated sale. Even the definition of a wholesale liquor dealer, taken by itself, implies more than a single transaction—a trade or business of selling, as expressed in the other sections referred to. The case states a single transaction, in respect to a lot of spirits taken for debt, and that affords no ground to infer that this was in prosecution of any trade or business requiring the payment of a license under the statute.

No other question is presented which seems to me to need consideration, except that which arises upon section 3281. The Bingham carried on business, as distillers, with intent to defraud the United States of the tax on the spirits distilled by them, or of some part thereof, and, at that time, were

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owners of the spirits seized, as to which no fraud or illegality appears. Before the seizure the spirits had been sold to Kingston for an existing debt, and Feigelstock had made an advance upon them, in good faith, and they had been removed, under Kingston's direction, from Indiana to New York, to be sold by Feigelstock on Kingston's account. The forfeiture denounced by the section in question is, that "all distilled spirits or wines, * * * owned by such person, wherever found," shall be forfeited to the United States. The question is, whether the forfeiture operates at the time when the statute is violated, as the plaintiffs contend, or at time of the seizure, as the claimant insists.

This question has been decided adversely to the United States by the District Court for the Southern District of New York, in the case now under review. A similar decision was made by the District Court of Maryland, in April, 1876, in *United States v. 100 Barrels*, and, upon writ of error to the Circuit Court of the United States for that District, the judgment was affirmed, (23 *Int. Rev. Record*, 10,) the Circuit Judge presiding. Under these circumstances, I think it suitable to follow those decisions without question ; and I do so the more readily, because it leaves the case in a condition in which it may, if such is the pleasure of the United States, be reviewed with the least delay.

Let the judgment be affirmed.

Roger M. Sherman, (*Assistant District Attorney*,) for the plaintiffs in error.

Waldemar J. Tuska, for the defendant in error.

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FRANCISCO J. MONTEJO AND OTHERS

vs.

THOMAS J. OWEN AND OTHERS.

M. brought an action at law, in this Court, on a judgment recovered by him against O., in another Court. O., by answer, set up a variety of matters which were not defences at common law against the judgment, but which were claimed to give O. an equitable right to prevent the enforcement of the judgment. On demurrer to the answer: *Held*, that the demurrer must be sustained.

Section 914 of the Revised Statutes of the United States does not authorize such an answer to be put in, in an action at law.

(Before JOHNSON, J., Southern District of New York, September 15th, 1877.)

JOHNSON, J. This case comes up on a demurrer by the plaintiffs to the answer of the defendants. The action is upon a judgment rendered by the Circuit Court of the United States for the District of Louisiana, in favor of the present plaintiffs against the present defendants. The answer sets up a variety of matters which are not defences at common law against the judgment, but which are claimed to give the defendants an equitable right to prevent the enforcement of the judgment. These matters the defendants insist are available to them as a defence in this suit, by force of section 914 of the Revised Statutes of the United States. That section prescribes, that, "the practice, pleadings, and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the Courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

It must be assumed, that, in a suit upon a judgment, brought in a Court of the State of New York, the defence set up in the answer in this suit would be available by way of answer, if sufficient in substance to entitle the party to relief against

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the judgment. Such is the known and established law of procedure in the State of New York, introduced by sections 69, 150 and 167 of its Code of Procedure. The first of these abolishes the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing, and declares, that thereafter there shall be, in that State, but one form of action. The next section cited enacts, that the defendant may set forth, by answer, as many defences and counter-claims as he may have, whether they be such as had been theretofore legal or equitable, or both. The last section named enacts, that the plaintiff may unite in the same complaint several causes of action, whether they be such as had been theretofore denominated legal or equitable, or both, under certain specified conditions. These sections of the Code deal with claims legal and equitable, and defences legal and equitable, set up by answer, and counter-claims of both characters. In pursuance of the policy thus indicated, section 274 of such Code provides, that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. It is, of course, obvious, that this system, while it undertakes to provide for the means of administering indiscriminately legal and equitable remedies, in substance, founded upon legal and equitable rights, completely ignores all the former schemes of procedure founded on the recognition of their differences. Now, from the purview of section 914 of the United States Revised Statutes, which is already set forth, equity and admiralty causes are completely excluded, in terms. That section does not relate to them, except to effect such exclusion. The jurisprudence of the United States has recognized this distinction in numerous cases, as one of substance, as well as of form and procedure. (*Robinson v. Campbell*, 3 *Wheaton*, 212; *Bennett v. Butterworth*, 11 *How.*, 669; *McFaul v. Ramsey*, 20 *How.*, 523; *Jones v. McMasters*, 20 *How.*, 8, 22; *Fenn v. Holme*, 21 *How.*, 481; *Thompson v.*

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Railroad Co., 6 *Wallace*, 134.) In the last case cited, Mr. Justice Davis says, giving the opinion of the Court: "The Constitution of the United States and the Acts of Congress recognize and establish the distinction between law and equity. The remedies in the Courts of the United States are, at common law or in equity, not according to the practice of State Courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And, although the forms of proceedings and practice in the State Courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit." In the case of *Bennett v. Butterworth*, (above cited,) Chief Justice Taney said: "The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may, undoubtedly, proceed according to the forms of practice, in such cases, in the State Court. But, if the claim is an equitable one, he must proceed according to the rules which this Court has prescribed, regulating proceedings in equity in the Courts of the United States."

That these discriminations between legal and equitable rights and suits are substantial, in the jurisprudence of the United States, is further apparent from provisions of the statute law, as well as from the decisions of the Courts. Under section 721 of the Revised Statutes, the laws of the several States, with certain exceptions, must be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply; while, on the other hand, the law of equity, in the Courts of the United States, is one and the same in every State, not dependent upon local law. "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for

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the Courts of the United States, and for the Supreme Court, in the last resort, to decide what those principles are, and to apply such of them to each particular case, as they may find justly applicable thereto." (*Neves v. Scott*, 13 *How.*, 268.) Nor are the statutes silent as to the forms and modes of procedure in suits in equity. Section 913 of the Revised Statutes declares, that they shall be according to the principles, rules and usages which belong to Courts of equity, except as modified by statute, or rules made in pursuance of statute, or by the Supreme Court. That Court has, accordingly, prescribed a body of rules regulating, very largely and comprehensively, the practice in equity.

It is claimed, that, inasmuch as the present action is one to enforce a judgment, and, therefore, not an equity cause, the procedure is to be conformed to that of the State Courts, upon such a cause of action; and that, as those Courts allow an equitable right to set aside or restrain the execution of such a judgment, by way of answer, the Courts of the United States must conform to that rule. But, this is a mere confusion of names. This so-called defence is an affirmative equitable right to the relief asked. It, under the cases and statutes cited, is to be administered under the equitable principles, and according to the equitable procedure, of the Courts of the United States. In that respect, the procedure cannot be conformed to the State practice without overthrowing the whole scheme for the administration of equity in the Courts of the United States. The action is at common law. The defence is, substantially, an action in equity, and it cannot, because it assumes the guise of an answer or defence under the State law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights.

The demurrer must be sustained, and judgment given for the plaintiffs, with leave to the defendants to amend, on payment of costs, within twenty days.

Granville P. Hawes, for the plaintiffs.

Frederic R. Coudert, for the defendants.

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JACOB R. HOWARD AND OTHERS, PLAINTIFFS IN ERROR

vs.

JOHN CROMPTON AND OTHERS, ASSIGNEES IN BANKRUPTCY OF
A. MILLER & Co., DEFENDANTS IN ERROR.

H., who was a debtor to a bankrupt at the time of the commencement of the proceedings in bankruptcy, thereafter and before the adjudication of bankruptcy paid the debt to the bankrupt, without any actual notice or knowledge of the pendency of the bankruptcy proceedings, and in the usual course of business, but the money thus paid did not come to the hands of the assignee in bankruptcy. The assignee brought suit against H. to recover the debt: *Held*, that the suit could be maintained.

Whether the District Court can try an action at law otherwise than by a jury, suggested.

(Before JOHNSON, J., Northern District of New York, September 24th, 1877.)

JOHNSON, J. This is a writ of error to the District Court. The important question presented by counsel, upon the argument, is, whether the assignees of the bankrupts can maintain an action against persons who were debtors of the bankrupts at the time of the commencement of the bankruptcy proceedings, to recover the amount of such debt, notwithstanding the facts, that, before the adjudication of bankruptcy was made, but after the commencement of the proceedings, the debtors paid to the bankrupts the full amount of their debt, without any actual notice or knowledge of the pendency of the bankruptcy proceedings, and in the usual course of business, the money thus paid not having come to the hands of the assignees. It was determined, in the District Court, that the action could be maintained.

But for the fact of payment, there could, of course, be no question of the right of the assignees to maintain the suit. Section 14 of the bankrupt Act of March^{2d}, 1867, (14 *U. S. Stat. at Large*, 522,) directs the judge or register to assign and convey to the assignee, by an instrument under his

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hand, all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and enacts, that "such assignment shall relate back to the commencement of said proceedings in bankruptcy, and that thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings;" and, after some further provisions, not material to be stated, it goes on to say: "All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had, if no assignment had been made, shall, in virtue of the adjudication of bankruptcy, and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate, debts, and effects."

The time of the commencement of the proceedings in bankruptcy is defined, by section 38, to be the time of the filing of the petition for adjudication. It is to that time that the effect of the assignment relates, which carries to the assignee the property then owned by the bankrupt. It does not carry that which he subsequently acquires, whether by his own industry or by any other mode of acquisition. This period is fixed for the operation of the transfer of all the bankrupt's estate, real and personal—terms broad enough to carry every property interest. If, as is suggested, there is an absence of these words of reference in the clause of the 14th section

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which is above quoted, beginning with the provision in regard to property conveyed in fraud of creditors, it is still to be considered, that some time must be fixed as that which this part of the section refers to. It must be either the time of the commencement of the proceedings, or the later time of the appointment of the assignee. If it be the latter, then the extraordinary and irrational result will follow, that, as to some species of property, the creditors take that, and that only, which the bankrupt has at the beginning of the proceeding, while, in regard to other species of property, that, and that only, which he has at the appointment of the assignee, can be taken for the creditors. Such a rule is inconceivable, and may be unhesitatingly rejected by the Court, as not a possible legislative intent. I have no doubt that the relation back to the time of the commencement of the proceedings applies to every species of property interest, and marks the division between the ownership of the assignee, in reference to the past, and the ownership of the bankrupt, in respect to the future, acquisitions of the bankrupt. If this be the true sense of the provisions spoken of, then the assignees' title took effect, by relation, established by the statute, as of the named period, and effect must be given to it accordingly. That hardship and injustice may ensue in particular cases, is to be regretted, but does not warrant the Court in disregarding the will of the Legislature. In legislating on such a subject, a stringent and absolute rule prevents certain possibilities of fraud, very necessary to be guarded against, while it does render it possible that particular hardships may, in consequence of such rules, be brought about, but the weighing of the advantages of the one rule or the other belongs not to the Courts, but to the Legislature. It is said, that relation to another time is a fiction of law, and that law will not permit a fiction to work injustice. This is certainly true of those fictions introduced into the law for purposes of convenience, but has no reference to such as the Legislature has established, to subserve the legislative policy of the laws. Upon this subject, the observations of Ch. J.

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Tindal, in *Balme v. Hutton*, (9 *Bingham*, 471, 524,) are instructive, and throw much light upon all the questions involved in this part of the case. He says: "It has been observed, in one case, that this relation is a fiction of the law, and that fictions are not to be favored. But I must confess myself unable to consider it as any fiction at all; for, it appears to be the direct positive enactment of the Legislature, expressed in plain and unequivocal terms. That such an enactment is, indeed, attended, in some cases, with hardship, must be admitted, but there seemed to have been no alternative for the Legislature but either to allow these individual cases of hardship, or to submit to a general inconvenience; for, unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such relation was intended is evident from the consideration, that, in various instances, where the individual hardship was greater than was warranted by the general convenience, the Legislature has, from time to time, by new statutes, cut down the relation, in particular cases; as, first, in the case of payment of debts to the bankrupt before notice of an act of bankruptcy, (1 *Jac.* 1, c. 15;) next, in the case of the sale of real property by the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy, (21 *Jac.* 1, c. 19;) again, in the case of payments by the bankrupt to creditors, for goods sold, (19 *G.* 2, c. 32;) and, lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts, *bona fide* made and entered into more than two calendar months before the date and issuing of the commission (46 *G.* 3, c. 65.) All which provisions of the Legislature do prove and establish two points, first, that such relation to the act of bankruptcy did at the time exist under the previous enactments; and secondly, that nothing short of the authority of Parliament itself was sufficient to relax the severity of the

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former law. The Courts of law have uniformly held such construction of the bankrupt Acts. I will refer to one case only, namely, the judgment of Lord Hardwicke, when Chancellor, in *Billon v. Hyde*, (2 *Ves.*, 310;) because it appears to me to import that, at that time, he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord Hardwicke observes: "It is said that this rule, (the relation to the act of bankruptcy), founded on this Act of Parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one, which is the general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it, on this general rule, that it is better to suffer a particular mischief, than an inconvenience; and the Legislature foresaw that there would be a particular mischief which they cured by that proviso, but did not extend it further, because, the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so that it would be difficult, commonly, to find out whether there was a mixture of fraud; so the Legislature thought it better to lay down that general rule." The legislation of England has introduced exceptions to the generality of the relation back, created by their bankrupt laws, from time to time, thus mitigating the severity of the operation of those laws upon persons innocent of any wrongful intention. The first of these, in the order of time, was the statute 1 *Jac.*, 1, c. 15, sec. 14, which enacts, that no debtor of the bankrupt shall be endangered for the payment of his or her debt, truly and *bona fide*, to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt. If that were the law of the United States, as it was, and substantially is now, the law of England, the payment by the plaintiffs in error involved in this case would be protected. But, unfortunately for them, the Congress, in its wisdom, did not enact that or any equivalent provision, and the Courts

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have no authority to introduce it. Various English cases are referred to in the brief of the counsel for the plaintiffs in error, containing expressions which seem to favor his views on this subject, but they all are founded upon one or more of the exceptions which have been, from time to time, introduced into the English statute law. Those cases afford no ground for saying that the Courts have any power to give relief, but rather the contrary, because, the exceptions were introduced only by the direct provisions of the statutes referred to. The counsel for the plaintiffs in error endeavors to import into the law a necessity for notice, such as the English statutes, and the English cases founded upon those statutes, require; but, as those requirements of the English statutes do not form part of ours, there is no warrant for that course.

Without further pursuing the subject, I find no ground for doubt that the decision of the District Court was correct. The payment, though innocently made, having been made after the commencement of the bankruptcy proceedings, and the money, not having come to the hands of the assignees, did not extinguish the debt, and the right to recover is unaffected.

As no question has been made as to the mode of trial pursued in this case by the mutual consent of the Court and counsel, I do not feel called upon to consider its propriety, further than to refer to certain sections of the Revised Statutes, which bear upon the subject, (*sections* 566, 649 and 700,) and to remark that the two sections last referred to relate only to the Circuit Court.

The judgment must be affirmed.

Levi H. Brown, for the plaintiffs in error.

Seymour & Weaver, for the defendants in error.

The Eagle Manufacturing Company v. Draper.

THE EAGLE MANUFACTURING COMPANY

vs.

JOHN H. DRAPER AND HENRY DRAPER, EXECUTORS OF SIMON
DRAPER, DECEASED.

TWO OTHER CASES AGAINST THE SAME DEFENDANTS.

The rule stated, as to when a bill of exceptions may be signed and filed, and as to the circumstances under which a judgment will be vacated for the purpose of allowing a bill of exceptions which was not signed at the proper term, to be subsequently signed and filed.

(Before SHIPMAN, J., Southern District of New York, October 10th, 1877.)

SHIPMAN, J. These are motions to vacate the judgments in above-entitled causes, and continue the same to the next term, and that time be given to file bills of exceptions. The following facts are found to be true: Verdicts in favor of the respective plaintiffs were rendered in this Court, in January, 1874. Bills of exceptions in each of said cases were served upon the plaintiffs' counsel on February 27th, 1874, and were noticed for settlement on March 27th, 1874. By successive written "consents" of counsel, the settlement of said bills of exceptions was adjourned or extended to June 9th, 1874. The bills, with the plaintiffs' amendments, were presented to the Court for allowance, at that time. They were, upon presentation and examination, in fact disallowed, upon the ground that they were not in proper form, and were returned to the defendants' counsel, who were requested to draft new bills in conformity with the expressed views of the Court. No order of disallowance was formally entered. On December 21st, 1874, the counsel for the defendants gave notice to the plaintiffs' counsel, that the proposed bills of exceptions and the amendments thereto would be moved to a hearing again, on December 22d, 1874. According to my recollection, which is not distinct in regard to this hearing, the counsel were again

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instructed to draw new bills. Judgments were entered on the verdicts October 13th, 1875, as of October 9th, 1875, by consent of the parties. A new bill of exceptions in the Wright case was drawn by the defendants' counsel, and was served upon the plaintiffs' counsel, January 5th, 1876. On June 8th, 1876, the plaintiffs' counsel in each of said cases stipulated in writing, that the time wherein the defendants could prepare and file bills of exceptions, and file the records in the Supreme Court, should be extended for sixty days from said date. By two successive written stipulations, said time was extended for sixty days from August 3d, 1876, when the written stipulations ceased. On or about October 24th, 1876, the defendants' counsel made the written motion, dated October 20th, 1876, as on file. When said motion was made, the Court inquired whether new bills of exceptions had been drafted, and was informed that one bill, which, when made satisfactory to the parties, could serve as a guide or model, *mutatis mutandis*, for the two others, had been drawn and served. The counsel for the plaintiffs said that they had not examined this bill, but would do so promptly. The Court urged prompt attention to such examination, and, without further discussion, the matter dropped, and was not again brought to the attention of the Judge during his stay in New York. The second bill of exceptions has never been presented to the Court for allowance. Upon August 24th, 1877, at the request of the defendant's counsel, the formal order on file, upon the motion of October 20th, 1876, disallowing the first bill, was signed, and the petition on file was then presented, and an order to show cause was issued, returnable on September 18th, 1877. Upon the hearing, the petition was withdrawn, and the questions were discussed upon the order to show cause. Further consents by the plaintiffs' counsel for leave to perfect bills of exceptions are refused, and the proposed order to vacate the judgments is opposed. The objection of the Court to the original bills was, that they were not in the form which is directed in *Lincoln v. Clafin*, (7 Wall., 132.)

The questions which arise upon the foregoing facts are,

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whether the Court has power to vacate the judgments which were entered in October, 1875, without the consent of the plaintiffs' counsel, and whether, if the power exists, it should be exercised.

In *Muller v. Ehlers*, (1 *Otto*, 249,) it is held by the Supreme Court, that the power to reduce exceptions taken at the trial to form, and to have them signed and filed, is, "under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the Court during the term, or consent of the parties, save under very extraordinary circumstances." It is asked that the judgments be vacated, so that the bills of exceptions may appear to have been allowed and signed before or at the term when final judgments were rendered. The power of a Court to vacate or alter a judgment, at a term subsequent to the entry of the judgment, is examined and stated in *Bank of the United States v. Moss*, (6 *How.*, 31.) It has also often been held by the Circuit Courts, that they have power to open judgments which had been rendered at a previous term, for the purpose of correcting errors in the assessment of damages. (*Crookes v. Maxwell*, 6 *Blatchf. C. C. R.*, 468.) Without deciding the strict question of power, I am of opinion, that, if it exists, it should be exercised for the mere purpose of permitting bills of exceptions which have not been presented and signed at the proper term, to be subsequently filed and signed, only in those cases in which the Supreme Court has declared that the bill itself can be signed subsequently to the term at which the judgment was rendered; *i. e.*, in the absence of an express order of the Court during the term when the judgment was rendered, or in the absence of consent of the parties, only under extraordinary circumstances. An exercise of power under other circumstances would be an evasion of the rule which has been declared by the Supreme Court.

In this case, bills were prepared during the term when

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the verdicts were rendered, but were disallowed, of which fact counsel were aware, as is manifest from their drafting a new bill. At the October Term, 1875, judgments were rendered. A new bill was prepared in January 1876, (within the October Term, 1875,) but this bill has never been submitted to me for allowance. It is admitted that the motion of October 24th, 1876, related to the old bills. The delay was, however, cured by written consent, until October 3d, 1876. Additional consent is now refused.

The circumstances which call upon the Court to vacate the judgments are, that parties have been manifestly reluctant to discharge the irksome duty which was imposed upon them, and long delay has been occasioned by this reluctance. These circumstances are not so extraordinary as to induce me to exercise a power which should be exercised, if at all, only in cases of peculiar hardship.

The motions are denied.

James Thomson, for the plaintiffs.

Stewart L. Woodford, (*District Attorney*,) and *Henry E. Tremain*, (*Assistant District Attorney*,) for the defendants.

THADDEUS FAIRBANKS AND OTHERS

vs.

SAMUEL H. JACOBUS. IN EQUITY.

E. & T. Fairbanks & Co., manufacturers of scales, alleged that J. made scales, by using, to make the iron castings thereof, the corresponding parts of a scale made by them, to form the moulds for those castings, and that the general shape and arrangement and color and external appearance of such scales were imitated from the Fairbanks' scale so nearly that only an expert in scales could distinguish the differences between them. The words "Fairbank's patent" were cast on the scales made by both parties. All the patents

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which Fairbanks & Co. had had, had expired. Fairbanks & Co. applied for an injunction to restrain J. from using the words "Fairbanks' patent" on his scales, and from making or selling an imitation of Fairbanks & Co.'s scales: *Held*, that the application must be denied; that the words "Fairbanks' patent" were not a trade-mark; and that J. did not represent his scales to be of the make of Fairbanks & Co.

(Before JOHNSON, J., Southern District of New York, October, 15th, 1877.)

JOHNSON, J. This motion is made for a preliminary injunction to restrain the defendant from the use of the words "Fairbanks' patent" upon platform scales, and from making or selling an imitation of Fairbanks' scales. This preliminary relief is sought substantially upon the grounds of imitation of the article made and sold by the plaintiffs, and of violation of the plaintiffs' alleged trade-mark. No question of violation of patent right is involved, for there is no claim by the plaintiffs that the scale complained of is, either in the whole, or in any part, an invasion of any existing patent owned by the plaintiffs. Indeed, it is not claimed, on the part of the plaintiffs, that any part of their scale alleged to be imitated is protected by any existing patent, or that any existing patent owned by them applies to their own scale, except a small and unessential, though useful, addition to the scale frame, by which the oscillation of the weighing beam is prevented, under certain circumstances. This addition, which the scale complained of does not possess, is secured by an existing patent to the plaintiffs, and bears the proper words required by statute, "patented Feb. 11, 1862," cast upon it.

The alleged imitation, as claimed by the plaintiffs, consists in this, that the scale complained of, as to the iron castings entering into its structure, was made by using the corresponding parts of a scale made by the plaintiffs, to form the moulds for those castings; and that the general shape and arrangement, as well as the color and external appearance, are imitated from the plaintiffs' scale so nearly that only an expert in scales could distinguish the difference between them. While, as matter of fact, I should, after an inspection of the two scales, not think the discrimination so very difficult, yet

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it may be taken to be not only difficult, but impossible, to discriminate between them. That fact does not give the plaintiffs any right. Their patents, while they existed, (and those concerned terminated in or about 1845,) protected them in the essential structure of their invention, but exterior form, painted color, and such non-essentials, were not, and could not be, the subject of the patents, and did not, and could not, secure these to the plaintiffs. Much less could these be secured as a trade-mark, for, a trade-mark is always something indicative of origin or ownership, by adoption and repute, and is something different from the article itself which the mark designates. An invention of structure a patent for the invention secures; a design is secured by a patent for that. Apart from these, any one may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person. Any other doctrine is impossible to be maintained; for, otherwise, all the colors, all the unessential forms, could be monopolized as trade-marks, and exclusive rights would be created, not limited in time, as patents are, founded upon no public utility, and subject to no control but the will of the adopter. I think there is no difference in the cases on this subject. (*Amoskeag Co. v. Spear*, 2 *Sandf. S. C. R.*, 599; *Gillott v. Esterbrook*, 47 *Barb.*, 455; *Newman v. Alvord*, 49 *Barb.*, 588.) I conclude, therefore, that there is no invasion of the plaintiffs' rights, in the purposed and actual identity, both of structure and appearance, in the scales in respect to which the defendant is sued, with those which the plaintiffs manufacture.

The case does not, however, rest here. On the base of the platform of what I may call the defendant's scale, are cast the words, "Fairbanks' patent," with the number indicative of size, 11, and upon the weigh beam are stamped the words "Fairbanks' patent." These are all the words which appear upon these scales, which can be the foundation of a charge of

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invasion of trade-mark, and, indeed, are all the words or figures upon any part of the scale. The same words appear on corresponding parts of the plaintiffs' scale, and, if they constitute a legal trade-mark, I shall assume, for the present purpose, that the defendant's scales violate it. Are these words a name of origin, or a name of quality, indicating structure? Whatever they are in the one scale, they are, also, in the other. In some of the plaintiffs' scales their origin is signified by a quite different mark: "Fairbanks' Standard, made only by E. & T. Fairbanks & Co., St. Johnsbury, Vermont." This is a valid trade-mark of the plaintiffs, but does not appear upon their scale produced in Court. The other words must be understood as claiming that the thing on which it appears is protected by a patent. Especially is it thus localized and referred to the particular parts on which it appears, when, upon another part, is found the proper patent mark, which is necessary to support an action for an infringement, in the absence of notice, under section 4900 of the Revised Statutes. This gives significance to the use of the other marks, and makes the conclusion almost irresistible, that the purpose of the other words, on the beam and the frame, are to impress upon the incautious public, that the scale is the subject of a patent, and, therefore, not open to competition in manufacture or sale. I agree, on this point, with the position of the plaintiffs' counsel, in his printed points, that "it is an error to suppose that even the patentee may so stamp his articles and deceive the public after the expiration of his patent"—citing *Leather Cloth Co. v. Am. Leather Cloth Co.*, (*Am. Trade-Mark Cases*, 688, 713.) And I add, in confirmation of this view, the decision of Judge Cadwalader, in the Eastern District of Pennsylvania, October 4th, 1875, in *Consol. Fruit Jar Co. v. Dorflinger*, (1 *N. Y. Weekly Digest*, 427,) upon reasons which seem to me quite satisfactory, and by which, on a motion for a preliminary injunction, I ought to be guided. It is, of course, no answer, that the defendant is, at least, guilty of the same fault, or even a greater. The plaintiffs fail to make these words out to be a lawful trade-mark, and, of course, cannot maintain upon them their claim for relief.

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As to the charge that the defendant threatens various supposed wrongs to the plaintiffs, in imitating their manufacture, and that he represents his scales to be of the plaintiffs' make, the allegations are not so made out as to satisfy my mind of their substantial truth. (*Byam v. Bullard*, 1 *Curtis' C. C. R.*, 100.) I doubt whether the defendant meant anything beyond the assertion of a right to use the words on the scale, which had been for many years openly used by him and his predecessors, under claim of right, and for some time, at least, and to some extent, with the knowledge of the plaintiffs or their predecessors.

Certainly, if the words "Fairbanks' patent" do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is, to pretend that a scale is made by one person, which is, in fact, made by another.

In trade-mark cases, it is by no means of course to grant preliminary injunctions, even where the plaintiff's case seems to be made out; and I shall, therefore, leave the further consideration of the case to the final hearing, when the questions as to the defendant's claim of right to the use of the words, "Fairbanks' patent," and the other questions of fact just referred to, and the unexplained circumstances and terms of the writing claimed to have extinguished the right of Chamberlain, can, if necessary, be further considered. The motion for an injunction must be denied, and the order heretofore made, granting an injunction till the decision of the motion, must be vacated.

Lucius E. Chittenden, for the plaintiffs.

Reed & Drake, for the defendant.

Blake v. The Greenwood Cemetery.

ELI W. BLAKE vs. THE GREENWOOD CEMETERY. IN EQUITY.

An application was made for a preliminary injunction, to restrain a cemetery corporation from using a stone breaking machine, in infringement of a patent. The machine was used to break stone to keep in repair the roads of the cemetery. The defendant set up a license. The plaintiff exercised his monopoly by granting licenses to use his machine. The defendants offered to pay into Court the amount of the license fee on its machine, to abide a final decision on the question of the existence of a license: *Held*, that, on such payment into Court, the application must be denied.

(Before BENEDICT, J., Eastern District of New York, October 19th, 1877.)

BENEDICT, J. This action is brought against the Greenwood Cemetery, to obtain an injunction and damages for the use, by the defendants, of a certain stone-breaking machine. The case is now before the Court, upon the plaintiff's motion for a preliminary injunction to restrain the defendants from using the machine during the pendency of the action. The facts are not in dispute. It is not denied that the machine in use by the defendants is an infringement upon the plaintiff's patent, as set out in his bill, and the validity of the patent is not disputed. As to these questions, there could be no dispute, for, not only this patent, but this identical machine, has formed the subject of a former action in this Court, brought by this plaintiff against the maker of this and three similar machines, in which action the validity of the plaintiff's patent was declared, and the machine in question decided to be an infringement. That decision having been since affirmed by the Supreme Court of the United States, upon appeal, (*Blake v. Robertson*, 4 *Otto*, 728,) furnishes the law of this case in respect to the question of infringement. But, in that action, brought, as it was, against the maker of the machine, to recover damages for its construction, with others, and in which the damages were fixed in pursuance of a stipulation between the parties in respect thereto, inasmuch as the evidence offered to prove the damages failed to show any amount of damages sustained by reason of the construction of the machines com-

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plained of, the recovery was limited to one dollar, as nominal damages. In this action, that former action, together with the payment of the one dollar there awarded, is set up by way of defence, and it is contended that the defendants, by reason of the said recovery, are entitled to use the machine in question, as a licensed machine, without further payment to the patentee. Pending the determination of the question thus raised, which the defendants are entitled to have determined upon final hearing, and not upon this motion, there is a difficulty in granting a temporary injunction, arising out of the nature of the use to which the machine in question is devoted. The machine complained of is a powerful and expensive stone-crusher, used solely for the purpose of breaking the stone needed to keep in repair the roads of that cemetery called Greenwood, where are the graves of nearly two hundred thousand dead—the dead of every State in the Union, and of almost every nation on the earth. Some nineteen miles of roads border the burial lots of this great city of the dead. These roads are constantly travelled by the living, upon the saddest of all their errands. There is no part of the cemetery which may not be, at any moment, required to be used for the purposes of interment, and the necessity is absolute, that its ways and paths be unimpeded and in good repair. The duty of maintaining these roads belongs to the defendants, but it is, in no proper sense, a private obligation. The machine in question cannot fairly be said to be employed for the profit of any one, but for the convenience of the public, to the end that the people, without annoyance or obstruction, may bury their dead. Such a use, it is plain, should not be interfered with by the Court, unless such intervention by the Court is an absolute right of the plaintiff. In this stage of the case, the plaintiff can have no such absolute right. His papers show that he does not derive profit for his patent by using his machines, but that he charges a fixed royalty or license fee, according to the size of the machine. The amount of this royalty upon the machine in question the defendants now offer to pay into Court, to abide the decision of the question raised

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by their answer. Such a payment of his royalty will fully protect the rights of the plaintiff; and the offer to make the payment renders it impossible for the plaintiff successfully to contend that a temporary injunction is necessary to prevent irreparable injury to him. The motion must, therefore, be denied, provided the defendants pay into the registry of this Court, to abide the event of this action, the amount of the plaintiff's royalty upon the machine in question.

Henry T. Blake, for the plaintiffs.

Benjamin E. Valentine, for the defendant.

THE UNITED STATES vs. HENRY SCHROEDER.

The sentence of a convicted prisoner, sentenced to be imprisoned for twelve months, did not fix the place of confinement. The sentence was executed in Ludlow street jail. Ten months of the term having expired, the prisoner applied for his discharge, on the ground that, under the Act of March 3d, 1875, (18 U. S. Stat. at Large, 479,) he was entitled to a deduction of five days during every month: *Held*, that, as the State of New York had a system of commutation for its own prisoners, the deduction could not be allowed; *Held*, also, that the prisoner would be entitled, under § 5548 of the Revised Statutes, to the deduction of one month, there allowed, on the certificate and approval required by that section.

(Before BENEDICT, J., Southern District of New York, October 29th, 1877.)

BENEDICT, J. The prisoner, upon conviction, was sentenced to be imprisoned for twelve months. The sentence, as has been usual in this District, did not fix the place of confinement, and, accordingly, the sentence has been executed in Ludlow street jail, that jail being the one hitherto used for the temporary confinement of prisoners in this District. Ten months of the term of imprisonment having expired, the prisoner now applies to be discharged, upon the ground, that, by virtue of the Act of March 3d, 1875, (18 U. S. Stat. at Large,

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479,) he is entitled to a deduction from the time of his imprisonment of five days during every month, no charge of misconduct having been sustained against him during his imprisonment. An examination of the terms of the Act of March 3d, 1875, shows, that the deduction there provided for can be allowed only to persons confined in a State which has no system of commutation for its own prisoners. The State of New York has a system of commutation for its own prisoners, (*Laws of 1863, chap. 415, and Laws of 1864, chap. 321,*) and therefore, the deduction of five days per month, prescribed by the Act of 1875, cannot be allowed. The fact that the State system of commutation does not allow any deduction to prisoners confined in jails does not affect the question. There is still a State system of commutation, and the fact of the existence of such a system takes the case out of the scope of the Act of 1875, without regard to the particular provisions of that system.

To avoid a second application, I may say, that, although the prisoner is not entitled to the deduction allowed by the Act of 1875, I am of the opinion he will be entitled to the deduction of one month, allowed by § 5543 of the Revised Statutes, upon the certificate and approval required by that section. The words, "State jail or penitentiary," used in that section, are not to be considered as intended to limit the provision to jails supported by the State at large, if, in any State, there are such jails, as distinguished from the common jails kept by the counties of the State, by virtue of State laws. They refer to the jails and penitentiaries within a State, whether State, city or county institutions, which are permitted by the State to be used for the confinement of the prisoners of the United States. (*Laws of New York, of 1847, chap. 460, § 16.*) Ludlow street jail, in the city of New York, is, therefore, a State jail, within the meaning of § 5543.

Benjamin B. Foster, (Assistant District Attorney,) for the United States.

Byron A. Cohen, for the defendant.

Haas v. Arthur.

SIMEON HAAS AND OTHERS vs. CHESTER A. ARTHUR.

H., on the entry of merchandise at the custom house, added 18 *per cent.* to the market value, as stated in the invoice, with a protest, stating that he made the addition to prevent a seizure, and that the real value was the original invoice value. On like merchandise entered before by H., on like invoices, 18 *per cent.* had, on appraisal, been added to the invoice value, and the goods had been seized for forfeiture. In a suit brought by H. to recover back the duties paid on the added 18 *per cent.*: *Held*, that the action could not be maintained. After the addition by H. of the 18 *per cent.*, the value of the goods, for duty, could not be fixed, by appraisal, at a less sum than that arrived at by such addition.

(Before WALLACE, J., Southern District of New York, November 12th, 1877.)

WALLACE, J. The plaintiffs, upon the entry of certain merchandise, added eighteen *per cent.* to the market value as stated in the invoice, accompanying the act by a protest, in which they stated that they added the eighteen *per cent.* to the invoice value under compulsion, to prevent a seizure of the merchandise, and that the real value was correctly set forth originally in the invoice. Similar merchandise had theretofore been entered by the plaintiffs upon similar invoices, and upon appraisal, eighteen *per cent.* had been added, and the merchandise had thereupon been seized for forfeiture; and their object was to avoid such a result in the present entry. They now seek to recover from the defendant, the collector, the duty assessed upon the additional eighteen *per cent.*

The action cannot be maintained. Upon the entry of their merchandise, one of two courses was open to the plaintiffs. If they believed the market value of the merchandise to be correctly stated in the invoice, they could have relied upon this belief, and, in case it was fixed at a higher value, upon appraisal, could have had redress by an appeal from the appraisal. If they were unwilling to adopt this course, fearing the contingency of an appraisal which might fix the value of the merchandise at a sum so much greater than the invoice

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value, as to subject them to an action for penal duty or forfeiture, they had the right to add to the invoice value such sum as they should deem advisable, in which event there could not legally be an appraisal for a less value. No other course was open to the plaintiffs. Instead of selecting the former they selected the latter, and thereby put it beyond the power of the appraisers to fix a lower value than that on which the duties were collected. The plaintiffs could not qualify the effect of their act in adding to the value in the invoice, by assigning the reasons which induced them so to do. Having fixed the value at a sum below which there could not be an appraisal, they cannot be heard to complain of the result, and are liable to pay the duties assessed.

Judgment is ordered for the defendant.

Stephen G. Clarke, for the plaintiffs.

Henry E. Tremain, (*Assistant District Attorney*), for the defendant.

JOSEPH H. WALKER AND OTHERS

vs.

JOHN H. BYRNES AND OTHERS.

Where a declaration sets forth as the cause of action fraudulent representations made to induce, and which did induce, a sale of goods on credit, the averments of fraud will not be stricken out, on the motion of the defendant, so as to make the action only one of assumpsit for goods sold and delivered.

(Before Wallace, J., Northern District of New York, November 12th, 1877.)

WALLACE, J. The defendants move to strike out, as redundant and irrelevant matter, various allegations in the declaration, which, in substance, set forth fraud and deceit in

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the purchase of goods by the defendants from the plaintiffs, on credit, the defendants insisting that the cause of action is for goods sold and delivered, that a recovery can be had in the action without proof of fraud or deceit, and, therefore, that the allegations in question have properly no place in the declaration. No question is made as to the form and sufficiency of the averments of fraud, but the sole ground taken is, that the allegations of facts which merely show the right to arrest the defendants, are not constitutive of a cause of action, and are not traversable by answer. Various decisions of the State Courts are cited, which sustain the views of the defendants' counsel, but the weight of authority, in my view, is on the other side. It will not be profitable to review the cases at length. The following are among those which hold that the fraud is the gist of the action, and that no recovery can be had without proving it. (*Ross v. Mather*, 51 *N. Y.*, 108; *Burnham v. Walkup*, 54 *N. Y.*, 656; *Dudley v. Scranton*, 57 *N. Y.*, 424; *Elwood v. Gardner*, 45 *N. Y.*, 349.) An action for the price of goods sold is substantially different from an action for a fraudulent representation, and the circumstances that the fraudulent representation was made to induce, and did induce, a sale of goods on credit, does not change the cause of action from one in fraud to one in assumpsit. If the plaintiff chooses to ground his action upon the fraud, and thereby seek for a judgment which will authorize the imprisonment of the defendant, and which cannot be affected by a discharge of the defendant in bankruptcy, he must prove the representations and the scienter, or fail in the action. The averments of fraud in the declaration are vital to the cause of action, and the motion to strike them out is denied.

Martin W. Cooke, for the plaintiffs.

D. C. Feeley, for the defendants.

Stellwagen v. The Life Association of America.

MAGDALENA STELLWAGEN

vs.

THE LIFE ASSOCIATION OF AMERICA.

When a motion for a new trial on the ground of surprise is made, because witnesses have failed to testify as they represented, before the trial, they would testify, the question is, whether the evidence to be produced on another trial is such as will probably secure a different result.

(Before WALLACE, J., Northern District of New York, November 12th, 1877.)

WALLACE, J. Witnesses for the defendant, having represented to the defendant's attorney that they were cognizant of material facts for the defence, were subpoenaed by the defendant, and, on the trial, denied all knowledge of the facts, under circumstances which justify a strong inference that they committed perjury. The defendant now moves for a new trial, on the ground of surprise; and the only question I deem it material to consider is, whether the evidence which it appears the defendant can produce upon another trial is such as will probably secure a different result from that of the former trial, for, unless such is the case, the motion should be denied.

The action is on policies of insurance upon the life of John Stellwagen. The defence, so far as it is now in question, is based upon a breach of warranty as to facts set forth in the application for insurance, and upon fraudulent concealment; and, within the present issues, the evidence should be such as to authorize the jury to find that some of the parents or brothers of John Stellwagen had been afflicted with pulmonary or other diseases, hereditary in their nature, to the knowledge of John Stellwagen, or that there were no material facts except those which had already been answered in the application, respecting the physical or mental condition of John Stellwagen, or his personal or family history, of which the officers of the defendant ought to be informed, or that the

cause of the death of the brother of John Stellwagen was fraudulently concealed. Concisely stated, if the evidence which, it appears, the defendant can produce upon a new trial, would authorize the jury to find that Daniel Stellwagen, the brother of the insured, had been afflicted with insanity, or committed suicide while insane, and that the insured had knowledge of the fact, there should be a new trial; otherwise, not.

The testimony on the former trial together with that which the affidavits show the defendant can obtain, is sufficient to authorize a jury to find that Daniel Stellwagen was insane, but, I am of opinion, is insufficient to support a finding that John Stellwagen had knowledge of his brother's insanity. The substance of the evidence, disregarding that which is merely hearsay, is an entry in the records of the Erie County poor-house, made in the year 1850, showing the commitment of Daniel Stellwagen as an insane pauper, the finding of a coroner's jury, to the effect that Daniel Stellwagen "came to his death by committing suicide, or accidentally falling while laboring under a mental derangement of mind," and the testimony of three witnesses, who worked with Daniel for several months, shortly prior to his death, and who detail the acts upon which they predicate their opinion of his insanity.

The incompetent evidence bearing on this question is to be laid out of the case. Neither the verdict of the jury at the coroner's inquest, nor the entries in the books of the poor-house, can be proved, without evidence showing that they had been brought to John's attention before he applied to be insured; and all that remains is inadmissible, because hearsay, except that which relates to the conduct of Daniel, upon which the witnesses base their opinion of his insanity. This conduct, as described in the affidavits, is not marked by any decisive symptoms of insanity, and, if it should be assumed that John had observed it, of which there is no proof, is as consistent with other theories of the moving cause as with that of insanity. Excluding from consideration Daniel's death by insane suicide, and his confinement as an insane person, the remaining facts which are capable of proof by competent

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testimony, would not authorize a jury to find a fraudulent suppression in the application, or that John knew his brother had been afflicted with a hereditary disease. It is to be observed, that all the acts upon which insanity is predicated, occurred over twenty years prior to the application for the insurance; that no admissions of John as to any knowledge regarding Daniel's physical or mental condition are proffered; that none of the witnesses speak of any conduct of Daniel when John was present; and that the conduct upon which they base their opinions of insanity, though consistent with that theory, is not inconsistent with other deductions. While the relationship between John and Daniel, and the fact that they lived in the same city, afford strong moral evidence that John knew of his brother's insanity, if it existed, it is not legal evidence, in the absence of any proof of intimacy between them. The brother who survives the insured, who had equal facilities for information with John, testified, on the former trial, that he had never heard that Daniel was insane. The burden of proof is on the defendant, to show John's knowledge of his brother's insanity, and this cannot be proved by speculation or conjecture.

I attach but little importance to the defence predicated on the statement, in response to a question in the application, that no material facts respecting the family history of the insured existed, of which the officers of the defendant ought to be informed. Information had already been given, by the answers to the questions in the application, of every conceivable fact about which the officers of the defendant deemed it necessary to inquire. If the information was correct, the question was a mere drag-net, for the purpose of procuring some technical defence to the policy; if not correct, the defendant had the means to avail itself of substantial and meritorious defences.

In conclusion, while it can hardly be claimed that the defences arising from the breach of warranty can be maintained with any practical chances of success, the evidence in support of them is not sufficient, considered in its theoretical import-

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ance upon the result of a new trial, to justify the granting of the motion.

A new trial is, therefore, denied.

Delavan F. Clark, for the plaintiff.

Benjamin H. Austin, for the defendant.

RAFAEL PENTLARGE

vs.

WILLIAM R. BEESTON AND FREDERICK PENTLARGE. IN EQUITY.

P. obtained a patent, as inventor, in March, 1874, for an "improvement in bungs for casks." In June, 1876, B. applied for a patent, as inventor, for the same invention. An interference was declared, and proofs were taken. The examiner decided in favor of P. On appeal, the board of examiners decided in favor of B. On further appeal, the Commissioner of Patents decided in favor of P. After the issue of the patent to P., B. and F. were in partnership with P., and the firm made the bungs and advertised them as secured by patent. After the dissolution of such partnership, B. and F. continued to make the bungs: *Held*, that P. was entitled to a preliminary injunction to restrain B. and F. from so doing.

The proceedings before the Patent Office, between the same parties, cast on the defendants the burden of showing the determination of the Commissioner to have been manifestly wrong.

(Before BENEDICT, J., Eastern District of New York, November 14th, 1877.)

BENEDICT, J. This action is brought to recover damages for the infringement of a patent for an "improvement in bungs for casks," issued to the plaintiff March 17th, 1874, and reissued on June 30th, 1874, and to obtain an injunction. The case is now before the Court upon a motion for a preliminary injunction, to restrain the defendants from manufacturing a certain form of bung during the pendency of the action. The issue between the parties presents a question of fact, the

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decision of which must depend largely upon the credibility of the witnesses. There is no dispute as to the novelty and usefulness of the invention described in the plaintiff's patent, but it is denied that the plaintiff was the inventor. An issue of this character is common enough, but, in this case, it presents some peculiar features. It is conceded, on all sides, that the invention in question originated in the factory of Beeston, Pentlarge & Co., a firm engaged in manufacturing bungs; that it was first conceived in the month of February, 1874; and that the circumstance which led to the conception was a visit to the firm of one George W. Gillette. The firm of Beeston, Pentlarge & Co. was, at that time, composed of Rafael Pentlarge, the plaintiff, and William R. Beeston and Frederick Pentlarge, the defendants; and the question in the case is, which of the parties invented this bung. No one claims that there was a joint invention, but Rafael Pentlarge, the plaintiff, and William H. Beeston each claims to have been the sole inventor. This question has before been raised between these same parties, in an interference case before the Patent Office. The original patent having been issued in March, 1874, on June 13th, 1876, the defendant Beeston applied to the Patent Office for a patent for the same invention, then for the first time making any public claim to be the inventor. A case of interference was then declared, and, in that case, testimony was taken at considerable length, and by both parties. The case was stoutly contested, and it was three times argued. In the first instance, the decision of the examiner was adverse to the claim of Beeston. An appeal was taken to the Board of Examiners, and the decision of the Board was to issue a patent to Beeston, in order, as the Board say, that Beeston should be put on an equal footing with Pentlarge before the Courts. From this determination of the Board of Examiners an appeal was taken to the Commissioner of Patents, who reversed the decision of the Board of Examiners, and refused to issue a patent to Beeston. In these several hearings the question at issue was the precise question argued upon this motion, and upon the determination of which,

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at final hearing, the validity of this patent depends. The evidence adduced in support of and in opposition to this motion consists of the evidence taken in the interference case, the parties having seen fit to make that a part of the record, together with certain additional affidavits; and the argument addressed to me has gone over the whole ground of controversy. I do not, however, feel called on, upon this motion, to make a determination of the decisive question of the case. That should be left to be decided upon the hearing of the cause. Without, therefore, determining whether this bung was invented by Pentlarge or by Beeston, I am of the opinion that the motion of Pentlarge for an injunction should be granted, and for the following reasons: Pentlarge has a patent duly issued to him in 1874. Beeston has no patent. A strenuous controversy, wherein the parties, and their witnesses, were fully examined, with opportunity for cross-examination, has been had before the Patent Office, and the defendant Beeston then failed to convince the Commissioner that he was the inventor of this bung; and, while it is true that the hearing and decision in an interference case is not equivalent to a judicial determination, (*Union Paper Bag Machine Co. v. Crane*, 1 *Holmes*, 429,) it seems proper to consider, upon a motion like the present, proceedings such as were had before the Patent Office between the same parties, as having the effect to cast upon the defendants the burden of showing the determination to have been manifestly wrong.

Moreover, it appears in evidence, that, after the patent was issued to the plaintiff, and up to the time when the partnership relation between Beeston and the plaintiff was dissolved, the firm of Beeston, Pentlarge & Co. were making and selling these bungs, and were advertising them to the public as secured by patent. This was a representation by the defendants that the bungs were protected by the plaintiff's patent, that being the only patent ever issued for this invention; and, during this period, there was an acquiescence by the public in the claim thus made. Nor does it now appear that any persons besides the defendants, one of whom is the

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son, and both the former partners, of the plaintiff, claim the right to use this invention. Furthermore, since the dissolution of the partnership, and up to this time, the defendants, although well aware that the only patent in existence is that of the plaintiff, are making and selling these bungs as patented articles, and, by their advertisements, now represent to the public that the bungs they are making are secured by a patent.

These acts and declarations of the defendants are adverse to the ground they take in the defence of this action, and, coupled with the proceedings before the Patent Office, appear to me to constitute a valid ground for asking the interposition of this Court, by way of injunction, to compel the defendants to abstain from the manufacture of this bung until the validity of Beeston's claim shall have been passed on at the final hearing. The application for an injunction is, therefore, granted.

Preston Stevenson, for the plaintiff.

Abbett & Fuller, for the defendants.

EDWIN W. BULLINGER

vs.

JOSEPH MACKAY. IN EQUITY.

A suit in equity was heard on bill and answer, and the bill was dismissed. The plaintiff afterwards, before a final decree was entered, asked to be allowed to file a general replication and take testimony, offering to pay the accrued costs. No mistake or inadvertence was suggested: *Held*, that the motion must be denied.

(Before BENEDICT, J., Eastern District of New York, November 15th, 1877.)

Bullinger v. Mackey.

BENEDICT, J. This case comes before the Court upon a motion, on the part of the plaintiff, to be allowed to file a replication and take proofs, after a hearing had upon bill and answer. The action is brought to protect a copyright which the plaintiff asserts in a certain weekly business journal, called "The Counting House Monitor," which copyright he alleges the defendant has infringed by issuing certain publications known as "The A. B. C. Guide." The cause was brought to a hearing by the plaintiff upon bill and answer, when it appeared, and was held by the Court, that the answer contained a sufficient denial of the authorship of the work set forth in the bill as copyrighted. Accordingly, the bill was dismissed. Before the entry of a final decree dismissing the bill, the plaintiff presents his petition to be allowed to file a general replication and take testimony, offering to pay the costs of the cause up to this time. This petition is supported by an affidavit of the plaintiff, that he is able to prove the allegations of his bill. No other facts are relied on to support the application, and the sole reason assigned for the application is, that, inasmuch as this action has been commenced and the answer filed, if it is allowed to proceed, the necessity of bringing another action, for the purpose of obtaining a decision upon the validity of the plaintiff's copyright and its infringement by publications which the defendant continues to issue, will be avoided. I do not think the reason sufficient. The plaintiff, with his eyes open, deliberately elected to try the cause upon bill and answer. No mistake or inadvertence is suggested. The plaintiff selected his time and mode of trial, and put the defendant to the expense of a hearing, to reimburse which the meagre costs allowed by the laws of the United States are wholly inadequate. If the decree rendered upon the hearing so had is of any benefit to the defendant, I see no reason why he should now be deprived of such benefit. Certainly, the plaintiff cannot ask that the result of a trial procured by him, and which has put the defendant to cost, should now be set aside, to the detriment of the defendant. On the other hand, if no benefit can accrue to the defendant from the decree that has been ren-

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dered, it is not seen what injury can result to the plaintiff by allowing the decree to stand. The motion is denied.

Oliver Wells and Thomas William Clarke, for the plaintiff.

George W. Lord, for the defendant.

JASPER K. HERBERT vs. BENJAMIN F. BUTLER.

After a lapse of two and a half years, this Court refused to allow a bill of exceptions to be signed and filed, no step looking to that end having ever been before taken, and a writ of error in the case being pending in the Supreme Court.

(Before BENEDICT, J., Eastern District of New York, December 5th, 1877.)

BENEDICT, J. This cause was tried before the Court and a jury at the May term, 1875. During the trial various rulings were made by the Court, to which exceptions were taken and then noted. At the close of the testimony, the Court directed a verdict for the defendant, to which direction the plaintiff then excepted. Under the direction of the Court the jury found a verdict for the defendant, and judgment was then entered in favor of the defendant, for costs. Neither at that time nor since was any application made for a stay of proceedings upon the verdict. Nor was any consent ever given, nor order ever granted, giving time either to make a bill of exceptions, or to make a case and turn the same into a bill of exceptions. Until now no application was ever made for the allowance of a bill of exceptions, nor has any bill of exceptions been presented for settlement and signature. On the 23d of June, 1875, a writ of error was duly issued and served, and thereafter the record, with the case to be hereafter referred to, was transmitted to the Supreme Court of the United States, where it remains. On September 19th, 1875, a case, bearing the endorsement: "Agreed to, Develin & Miller, Att'ys for

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defendant," was presented to the Judge who tried the cause, who then, upon the request of the defendant, wrote thereon, below the said endorsement, the further endorsement: "Settled as within, pursuant to the above consent." As before stated, this case has been transmitted to the Supreme Court, as part of the record. In this position of the cause the plaintiff moves the Court for an order directing the signing, sealing and filing of a bill of exceptions herein, as of the 1st day of June, 1875, and presents the case above referred to to be now signed and sealed as a bill of exceptions. The motion is opposed by the defendant, mainly upon the grounds, first, that it was never consented, in behalf of the defendant, nor ordered by the Court, that the case might be turned into a bill of exceptions, and that, in the absence of such consent or order, the Court, now, after the lapse of several terms of the Court, is without power to make such an order in the cause; second, that the cause has been removed from this Court to the Supreme Court of the United States, and that, until the record shall be transmitted by the Supreme Court to the Circuit Court, the latter Court can make no alteration of the record.

I am constrained, by the authority of decisions of the Supreme Court of the United States, to deny this motion. This case differs from the case of *Williamson v. Suydam*, (4 *Blatchf. C. C. R.*, 323, and 20 *How.*, 427,) relied on by the plaintiff. In that case, the right to make a case and to turn the case into a bill of exceptions was reserved at the trial, while, here, no such right was reserved, nor any such permission given. In *United States v. Breitling*, (20 *Howard*, 252,) the signing of a bill of exceptions after the term was upheld only upon the ground that a consent to extend the time of settling a bill of exceptions was to be presumed from the circumstances of that case, but with the announcement from the Supreme Court, that "that case went to the extreme verge of the law upon this question of practice." (*Müller v. Ehlers*, 1 *Otto*, 249.)

The case last cited is decisive of the present application. In that case, an *ex parte* order, directing a bill of exceptions to be filed as of the date of the trial, was treated as a nullity, for

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want of power. In this case, the application is the same, but the defendant has notice of the application, and appears, to deny the power of the Court to grant such an order. The order applied for, if granted, would also be a nullity, because the term at which the trial was had and the judgment rendered was allowed to end without any steps whatever being taken towards the allowance of a bill of exceptions, or to obtain an extension of time for that purpose, and there is no circumstance from which to infer a consent to such an extension. It is true, that a case was agreed to by the defendant after the expiration of the term, but a case is not a bill of exceptions, and cannot be turned into a bill of exceptions unless an order is made to that end, and, in pursuance of such an order, the bill of exceptions is duly signed and sealed. And, according to the decision of the Supreme Court, the power to sign and seal a bill of exceptions in this cause ceased with the term at which the cause was tried. I notice, indeed, that it is intimated by the opinion delivered in *Müller v. Ehlers*, that, "under very extraordinary circumstances," the power to sign and seal a bill of exceptions may be exercised after the expiration of the term, but the action of the Court upon the circumstances of that case appears to forbid me to consider the circumstances of the present case as sufficient to justify the order now applied for. If the correctness of my understanding as to the rule intended to be laid down by the Supreme Court of the United States is doubted, the plaintiff may think fit to disclose to that Court the facts attending the case, upon an application to the Court to have the record transmitted to this Court, for the purpose of obtaining an allowance of a bill of exceptions, and the signing and filing of the same, in which case a direction by the Supreme Court that the record be transmitted for such a purpose would imply the existence of power in this Court, under the circumstances of this case, to grant the relief sought, and would dispose of both the grounds of objection that have been taken to any action of this Court at this time.

The C. F. Ackerman.

The motion must be denied, with liberty to renew the same in case the record be transmitted as above indicated.

John H. Bergen, for the plaintiff.

John E. Develin, for the defendant.

THE C. F. ACKERMAN.

In a suit *in rem* against a vessel, brought in the District Court, the vessel was discharged from custody, in that Court, on a stipulation for value. On appeal, a decree was rendered by the Circuit Court for the libellant, with a direction that the two stipulators for value pay into that Court the amount of such stipulation. One of the stipulators having died, the libellant applied for the entry of a summary judgment against the other stipulator, for the amount of the decree, and for execution against him. It was objected, that the libellant had not exhausted his remedy against the claimant of the vessel, and that the death of the one stipulator defeated the right of the libellant to execution against the survivor: *Held*, that the application must be granted.

(Before BENEDICT, J., Eastern District of New York, December 21st, 1877.)

BENEDICT, J. This is a proceeding *in rem*, which has been carried by appeal from the District to the Circuit Court, and there decided in favor of the libellants. While the case was in the District Court, the vessel was discharged from custody, upon a stipulation for value, which stipulation, accordingly, took the place of the vessel. Upon the determination of the case in the Circuit Court, it was there ordered, adjudged and decreed, that, in pursuance of the terms of the stipulation for value herein, given on the discharge of said steam tug from custody herein, Thomas Kenny and Erick P. Lindahl, the stipulators named therein, pay into this Court the amount of their stipulation, and that the libellants have execution to enforce this decree. The libellants, now, upon proof of failure to pay the decree and of non-performance of the stipulation, upon due notice, ask for a summary judgment against Erick

The C. F. Ackerman.

P. Lindahl, one of the stipulators for value, for the amount of the decree, and for execution against him to collect the amount. In opposition to the motion Lindahl appears and objects, upon the ground, that it does not appear that the libellants have exhausted their remedy against the claimants. The answer to the objection is, that the proceeding is *in rem*, and the libellants' right to proceed against the stipulators, upon the stipulation for value, became perfect upon the rendition of the decree. The stipulation for value represents the vessel, and the stipulators, by reason of their stipulation, are liable to a summary judgment against them, without other proceedings had, and without regard to the solvency of the claimants, or to any liability of the claimants, by reason of their intervention, if any such liability exists.

The only other question presented is, whether the death of one of the stipulators for value defeats the right of the libellants to execution against the survivor. It is to be observed, that, although the order of the Circuit Court does not, in terms, direct the entry of a summary judgment against the stipulators, it adjudges the stipulators liable to pay the amount awarded to the libellants, and authorizes execution to issue against them, in case of default. This order supposes authority to enter a summary judgment upon proof of non-compliance with the stipulation, and, such proof being made, requires the entry of judgment and the issuing of execution thereon. The right to give summary judgment upon a stipulation in Admiralty has been long recognized, not only by the District Courts, but also by the Circuit Courts, where such judgments have often been entered. It has also been recognized by the Supreme Court of the United States. This right appears to be expressly conferred, in actions *in personam*, by Admiralty Rules 3 and 4, of the Supreme Court, and the right to such a judgment, in actions *in rem*, is given by Rule 66 of the District Court of this District, under which rule the stipulation in question was taken. To the same effect is Rule 144 of the District Court for the Southern District of New York, where that rule has been in existence and

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acted upon for many years. I do not doubt, therefore, the power of this Court to direct the entry of a summary judgment upon the stipulation for value given in this case, against the surviving stipulator, who, by the terms of the stipulation, has made himself liable to pay the full amount of the decree. It is no answer to the engagement of such a stipulation, for him to say that another person, at one time bound with him, is now dead. What might be the libellants' rights against the estate of the deceased stipulator need not be considered, as the present application is only for a judgment and decree against the surviving stipulator.

The motion is granted.

Scudder & Carter, for the libellants.

Butler, Stillman & Hubbard, for the claimants.

LORIN INGERSOLL vs. DARIUS BENHAM AND OTHERS. IN EQUITY.

Under the circumstances of this case, the Court refused to open an interlocutory decree.

(Before WHEELER, J., Southern District of New York, December 22d, 1877.)

WHEELER, J. This cause has been heard on the petition of the defendants to open the interlocutory decree heretofore entered therein, because of the discovery of new matter, and the failure of their then counsel to fully represent their interests, and the answer of the orator thereto. It appears therefrom, that there has been no discovery of any new evidence, but only a discovery of a new use of that which was before well known. It is not claimed but that the facts were all fully known to the defendants and their counsel, but that the Circuit Court of the United States in the District of New Jersey has made a decision upon the facts, which they did

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not know of, and the like of which neither they nor their counsel saw fit to ask to have made here. If that was the only decision that had been made, and the question was open, doubtless, it would have great and, perhaps, controlling weight here. But, not only is the question foreclosed by this interlocutory decree, but also by a judgment the same way in an action at law, on the law side of this Court, between these same parties. So that, if this decree were removed, that judgment would still stand as a conclusive adjudication of the rights of the parties involved, which would bind the Court to make the same decree again. Therefore, it would be useless to open the decree, under the circumstances, if it was allowable, under the usual rules applicable, to open a decree for such a reason. But, further, the reason is not adequate. The decree in the District of New Jersey might as well be opened on account of the one here, as *vice versa*.

There is nothing to show but that the defendants were in full fact and properly represented by their counsel, according to his best judgment. The petition alleges, in substance, that they did not know he was so situated that he could not so represent them, but scarcely, if at all, sets forth that, in fact, he was so situated. But, if it be taken as an allegation to that extent, the allegation is not admitted in the answer nor proved evidence, and it would be unsafe and unjust, not only to the orator but to the solicitor, to assume that he did not do his full duty, without full proof that he did not.

Let the petition be dismissed.

Frederic H. Betts, for the plaintiff.

Benjamin F. Lee, for the defendants.

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DEXTER A. KNOWLTON

vs.

THE CONGRESS AND EMPIRE SPRING COMPANY.

Where an illegal contract or transaction is only partially performed, there is a *locus poenitentiae*, and either party may rescind the contract.

K. subscribed for shares in the capital stock of a corporation, in increase of its stock. The proceeding was illegal, because in contravention of the statute under which the corporation was organized. K. paid \$13,980 as an instalment on his subscription, on the first call. By the subscription, he was to forfeit all he had paid, if he failed to pay subsequent calls. He so failed, and, after the corporation had declared his rights to be forfeited, but before any scrip had been issued for the new stock, the corporation abandoned the plan of increasing the stock. K. sued the corporation to recover back the \$13,980: *Held*, that he was entitled to recover it.

(Before WALLACE, J., Northern District of New York, December 24th, 1877.)

WALLACE, J. This case comes here by removal from the State Court, after a decision adverse to the plaintiff by the Commission of Appeals, reversing the judgment of the Supreme Court in favor of the plaintiff, and ordering a new trial. (57 N. Y., 518.)

The plaintiff seeks to recover \$13,980, paid by him to the defendant upon a subscription for shares of its capital stock. The defendant, by the action of its directors and stockholders, instituted proceedings for an increase of its capital, and the subscription agreement was prepared and executed in furtherance of that object. It has been assumed, in the arguments of counsel, that these proceedings were illegal, as in contravention of the statute under which the defendant was organized, and constructively fraudulent as to the public and all stockholders not assenting thereto, and the decision of the case in the State Courts has been adjudicated upon that assumption. The plaintiff was a stockholder and trustee of the defendant, and participated actively in these proceedings.

The subscription agreement provided, that the subscribers

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should pay the defendant for the new shares in instalments, as called for by the directors, and, upon failure to pay any call for sixty days, should forfeit all sums theretofore paid upon the subscription. The plaintiff paid the sum in controversy upon the first call under the subscription, but failed to respond to subsequent calls for more than sixty days. After a resolution had been passed by the directors forfeiting the plaintiff's rights for delinquency, but before any scrip was issued for the new stock, and while the proceedings were inchoate, the stockholders resolved to abandon the project to increase the stock, and, pursuant to this action, the directors adjusted with parties who held receipts for payments under the subscription, by giving them the bonds of the defendant issued for that purpose. No bonds were tendered to the plaintiff, he demanded repayment of the money paid upon the subscription, and, being refused, brought this action.

If the subscription agreement was valid, the plaintiff can have no redress, but must be held to his stipulation to forfeit the payment for his delinquency in responding to subsequent calls. The defendant had become entitled to the plaintiff's money by the terms of the subscription agreement, at the time it concluded to abandon the scheme for increasing its capital, and, however hard and inequitable it may seem that the defendant should retain this money, while abandoning the project for which it was received, its legal right so to do is clear. On the other hand, if the subscription was executed as part of an illegal scheme, it is void in all of its conditions, and the defendant can take nothing under color of the forfeiture stipulated for. The sole question, in my view, therefore, is, whether the plaintiff will be permitted to recover money paid in partial performance of an illegal transaction. The defendant has no right to the money, unless that of possession, under circumstances which deny to the plaintiff the assistance of the Court in reclaiming it.

Certain propositions applicable to the present case are not debatable. Courts of justice refuse to entertain any application to enforce a contract or transaction which is immoral, or

subversive of public policy, or in contravention of a statute. When the transaction has been consummated, or the contract has been executed, if the parties to it are in *pari delicto*, neither will be permitted to recover money or property delivered to the other in furtherance of it. When the law which the transaction contravenes is designed for the coercion of one party, or the protection of the other, or where one party is the principal offender and the other acquiesces by constraint of circumstances, the parties are not in *pari delicto*, and the lesser offender will be relieved, although the illegal transaction has been consummated. So far, there is no diversity of opinion among text writers, or in the reported cases. Another proposition of controlling importance in this case, advanced by all the commentators, and sanctioned by many decisions, has been denied by the high authority of the Commission of Appeals, which is, that, where the contract or transaction is but partially performed, there is a *locus pœnitentiæ*, and either party may rescind.

In deciding the present case, the Commission of Appeals, (Dwight, Commissioner, dissenting,) have held, that money paid by one party in part performance of an illegal transaction cannot be recovered back, where both parties are in *pari delicto*, and that no distinction exists, as to the right of recovery, between cases of partial and of entire performance. Notwithstanding the great respect which I entertain for the authority of the Commission of Appeals, I am constrained to differ from the conclusion thus reached, and must hold, in the language adopted by Mr. Justice Bradley, (*Thomas v. City of Richmond*, 12 Wall., 349, 355,) that "a recovery can be had, as for money had and received, where the illegality consists in the contract itself, and that contract is not executed," and that "in such case, there is a *locus pœnitentiæ*, the *delictum* is incomplete, and the contract may be rescinded by either party." This statement of law finds support in the early case of *Walker v. Chapman*, (*Lofft*, 342,) where the plaintiff had paid money to procure a place in the customs, but which he did not get, and brought suit to recover back the payment,

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and Lord Mansfield decided in his favor; and, upon the authority of this case, in the subsequent case of *Lowry v. Bourdieu*, (*Doug.*, 468,) which was an action to recover a premium paid upon an insurance which was merely a gaming contract, but was brought after the event had happened upon which the insurance was to be paid, Buller, J., said: "There is a sound distinction between contracts executed and executory," and the plaintiff was defeated because the agreement was not executory. In *Tappenden v. Randall*, (2 *Bos. & P.*, 467,) an action was maintained to recover a payment upon an illegal contract, Heath, J., after adverting to the distinction between executed and executory contracts, stated by Mr. Justice Buller, saying: "I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled, against his will, to adhere to his contract." In *Hastelow v. Jackson*, (8 *B. & C.*, 221,) Littledale, J., says: "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards;" and a recovery was allowed on this ground. Other cases which proceeded upon the same rule are, *Aubert v. Walsh*, (4 *Taunt.*, 293;) *Busk v. Walsh*, (*Id.*, 290;) *Bone v. Ekless*, (5 *Hurls. & Nor.* 925.) The same doctrine has been recognized in our own Courts. (*White v. Franklin Bank*, 22 *Pick.*, 181; *Nellis v. Clark*, 4 *Hill*, 424; *Morgan v. Groff*, 4 *Barb.*, 524.) And, in the latest English case, *Taylor v. Bowers*, (34 *Law Times Rep.*, *N. S.*, 938,) decided in the Court of Appeal, in 1876, the plaintiff was permitted to recover property transferred to defraud creditors, where the scheme was not fully carried out, Mellish, L. J., saying: "If money is paid, or goods are delivered, for an illegal purpose, and that purpose is afterwards abandoned and repudiated, I think the person paying the money or delivering the goods may recover; but, if he waits until the illegal transaction is carried out, or seeks to enforce it, he cannot maintain his action."

In opposition to these authorities, there is not a single case of which I am aware, sustaining the conclusion of the

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Commission of Appeals. The cases cited in support of that conclusion, in the opinion of Lott, Ch. C., are, *Perkins v. Savage*, (15 *Wend.*, 412;) *Bell, Ex parte*, (1 *M. & S.*, 751;) *Howson v. Hancock*, (8 *Term R.*, 575;) *Bush v. Place*, (6 *Cow.*, 431;) and *The Saratoga County Bank v. King*, (44 *N. Y.*, 87.) In none of these cases did the question arise, whether the plaintiff could succeed in an action in disaffirmance of an unexecuted illegal contract.

In conclusion, I concur in the dissenting opinion of Dwight, Commissioner, that "the rule is well stated in 2 Comyn on Contracts, 109:" "If the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit." A different rule would hold out an inducement to the parties to an illegal transaction to persevere in their efforts to violate the law.

That the transaction in furtherance of which the payment was made has never been consummated, is clear. Before any stock was issued, the scheme to issue it was rescinded by the defendant. The real question is—was the *locus poenitentiae* open to the plaintiff at the time he brought this suit? He had declined to respond to the second call, when the defendant rescinded. Can there be any doubt, that, up to the time of the abandonment of the scheme by the defendant, the plaintiff could have resorted to a Court of equity, and restrained further proceedings, and vacated the proceedings already taken? The cases are numerous where Courts of equity have interfered to prevent the consummation of a wrong, upon the motion of a party who was instrumental in its inception. It is laid down by Judge Story, (1 *Equity Jur.*, § 298,) that, "where the agreements or other transactions are repudiated on account of being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis*, is not, in equity, material. The reason is, that the public interest requires that relief should be given; and it is given to the public through the party. And, in these cases, relief will be granted not only by setting aside the agreement or transaction, but, also, in many cases, by ordering a repay-

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ment of any money paid under it." See, also, *Neville v. Wilkinson*, (1 *Brown's Ch. Rep.*, 1st Am. ed., 548, note a.)

If the plaintiff had received the fruits of the illegal transaction, in equity, as at law, he could not have recovered his payment, but, until then, not only could he have been heard, but restitution would have been made to him. The *locus pœnitentiæ* was open to the plaintiff so long as he was in a position to resort to a Court of equity, and, surely, it was not closed to him by the action of the defendant in rescinding the illegal scheme. After that action on the part of the defendant, the plaintiff took the only steps he could take in repudiation of the transaction, by demanding his money and bringing his suit. He is not to be denied relief upon the theory that the *delictum* was complete.

It is claimed that no payment was in fact made of the sum sought to be recovered by the plaintiff. A dividend of four *per cent.* had been declared by the defendant to its stockholders, among them to Sheehan, who transferred his interest to the plaintiff, and the dividend, instead of being paid in money, was credited, by agreement, as a payment of the first call under the subscription. Stockholders who did not subscribe for the new stock were paid in money. The evidence does not justify the inference that the dividend was a fictitious or fraudulent one. The defendant has treated the dividend as though actually paid, not only in crediting it as a payment, but in its dealings with the other stockholders, and it is now too late to question its validity. The plaintiff bought it of Sheehan, and paid for it in full. His rights are the same as though he had borrowed the money of Sheehan to make the payment of the call.

Judgment is ordered for the plaintiff, for \$13,980, with interest from February 20th, 1866.

Peter Starr and Henry M. Ruggles, for the plaintiff.

Charles S. Lester, for the defendant.

In re Eberhard Wiegand, on Habeas Corpus.

IN THE MATTER OF EBERHARD WIEGAND, ON HABEAS CORPUS.

In a case of extradition, before a United States Commissioner, where he has before him legal and competent evidence relating to the charge against the accused, it is his judicial duty to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon has been conferred on any other judicial officer.

(Before BLATCHFORD, J., Southern District of New York, December 29th, 1877.)

BLATCHFORD, J. It is admitted that the offence of embezzling public money is within the treaty, and that the documentary evidence put in on the part of the German Government is properly authenticated under the Act of Congress, and is legally evidence under said Act, to be considered on the question of the criminality of the accused. It is also conceded that the accused is to be regarded as having been committed by the Commissioner for extradition for the offence charged, of having embezzled public money.

The counsel for the accused contends that the Commissioner ought not to have committed the accused for extradition, because he had not before him evidence of a competent character sufficient to establish probable cause to believe the accused guilty of the crime of embezzling public money. The Commissioner had before him, as evidence on that subject, what purported to be a letter from Wiegand, of June 5th, 1877, and sundry entries made by Wiegand in books kept by him. The Commissioner was the sole judge of the weight to be given to this evidence, subject only to a review by the President. There was sufficient evidence before him for him to say that he was satisfied, on legal grounds, that the letter in question was proved to have been written by Wiegand, and that the entries in question were made by the hand of Wiegand. It is determined in this Court, (*In re Stupp*, 12 *Blatchf. C. C. R.*, 501; *In re Vandervelpen*, *ante*, p. 137,) that, in a case of extradition before a Commissioner, where he has before him documentary evidence from abroad, properly

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authenticated under the Act of Congress, and such as is made evidence by such Act, and which relates to the charge against the accused, it is the judicial duty of the Commissioner to judge of the effect of such evidence, and that neither the duty nor the power to review his action thereon has been conferred on any other judicial officer. This province of the Commissioner extended to a determination on the question as to whether the embezzlement was a continuing embezzlement.

I do not consider the case as to the crime of forgery, for, the accused is legally held in custody under the warrant of arrest and the commitment thereon, which warrant and commitment are for the crime of embezzling public money as well as for the crime of forgery, and this is a proceeding on *habeas corpus*, and not a proceeding in review of the action of the Commissioner, as on a writ of error.

The writs of *habeas corpus* and *certiorari* are discharged, and the accused is remanded to the custody of the marshal under the process returned as the cause of imprisonment.

Abram J. Dittenhoefer, for the accused.

Edward Salomon, for the German Government.

THE BRANDON MANUFACTURING COMPANY

vs.

DAVID W. PRIME AND OTHERS. IN EQUITY.

Where a person commences a suit in equity in this Court, and the defendant in such suit files a cross-bill against him, in this Court, he cannot set up, as a ground of demurrer to such cross-bill, that a State Court had acquired prior jurisdiction, on a bill brought in that Court, for the same relief, by the plaintiff in such cross-bill.

Where a demurrer to the whole of a bill sets up that some of the relief prayed

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is not cognizable in equity, it will be overruled, if some of the relief prayed is properly prayed.

A cross-bill is properly filed to establish an equitable title to letters patent, the legal title to which is in the plaintiff in the original bill filed for an infringement of such patent.

Where a cross-bill, brought for relief as well as defence, shows that persons not parties to the original bill are necessary parties to the cross-bill, they may properly be made such.

(Before WHEELER, J., Vermont, January 2d, 1878.)

WHEELER, J. This cause has been heard on the several demurrer of defendant Strong, and joint demurrer of defendants Prime, Meacham and Luce, to the cross-bill. The causes of demurrer assigned are the same in each. They are, in substance, that this Court has not jurisdiction, because the Court of Chancery of the State had acquired prior jurisdiction, on a bill brought by the orator in the cross-bill, there, for the same relief; that some of the relief prayed is not cognizable in equity; that some of the subjects of the cross-bill are not the same as those of the original bill; and that Strong and another, made parties to the cross-bill, were not parties to the original bill. Both are demurrers to the whole bill.

The orators in the original bill commenced the litigation involved in this Court, and compelled the orator in the cross-bill to come here and join in it. Having brought it here they have no right to say that the whole or any part of it belongs anywhere else. If the cross-bill is appropriate to the original, it must relate to the subjects of it and embrace a part, at least, of the litigation introduced by it, so that, by filing the cross-bill, the orator in that has merely met those in the original where called upon by them to meet them. For this reason, a plea of jurisdiction in another Court is not a good plea to a cross-bill. (2 *Dan. Ch. Pr.*, 4th *Am. ed.*, 636; *Welford's Eq. Pl.*, 229; *Ld. Newburg v. Wren*, 1 *Vern.*, 220.) And, for the same reason, it is not necessary to show, in a proper cross-bill, that the relief sought by it is cognizable in equity. (*Story's Eq. Pl.*, § 399.) It has not been claimed in argument, and could not successfully be claimed, but that this cross-

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bill relates to the subject of the original in some respects, nor but that some of the relief prayed in the cross-bill is properly prayed. And it follows, that some of it is proper to be answered, in some form, by some of the parties; and, that some of it may not be, is no good reason for not answering what should be answered. As the demurrers are to the whole, and a part, clearly, should be answered, and the demurrers must be overruled or sustained as a whole, as to the causes relating to jurisdiction and relief, they must be overruled.

So far as the defendants Prime, Meacham and Luce are concerned, it would be sufficient to say, as to the other causes of demurrer, that, because other parties are improperly called upon to answer the cross-bill in this form, is no good reason why they, who are properly called upon to answer it, should not do so. But, if the others are properly called upon to answer it, *a fortiori*, they are, and should answer it.

The question hereupon is, merely, whether the cross-bill should be answered at all or not by these other parties. That depends, of course, upon whether the subjects of it are so presented here by it, that they are properly called upon to answer it, in the form in which they are presented. The original bill sets forth, in substance, that the orators in that have a patent that the orator in the cross-bill is infringing, and prays appropriate relief. The cross-bill sets forth, that the defendant Strong had the record title to the patent, and the orator the equitable title to it, and that the orators in the original bill acquired Strong's title, with notice of the outstanding equity, and were endeavoring to assert it against the equitable title, and prays restraint and a conveyance. It is, unquestionably, the proper office of a cross-bill to afford relief in such a case, if the case is made out. (*Story's Eq. Pl.*, § 391; *Calverley v. Williams*, 1 *Ves. jr.*, 210.) A cross-bill is like an original bill, except that it must rest on what is necessary to the defence of an original bill. In an original bill, brought by the orator in the cross-bill, for the same relief, there could be no fair question but that these new parties, of whom Strong is one, would be proper parties. In this original bill, as it is framed, these

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do not appear to be necessary parties, but, when the facts set up in the cross-bill appear, they become so. Following the ordinary rule, when the orator in the cross-bill resorts to it for defence and relief, and makes it appear that they are not only proper but necessary parties to the litigation, that orator not only might, but ought, to make them parties. If there were no authorities and was no practice on the subject, on principle, that would seem to be the proper course. That the practice in this State, which professes to follow the English Chancery practice, the same that is followed in this Court, would warrant making him a party, is well known, and appears in the State reports. (*Blodgett v. Hobart*, 18 *Vt.*, 414.) It does not appear expressly, from such English reports or text-books as have been examined, what the actual practice in such cases there has been. In this country, in *Curd v. Lewis*, (1 *Dana*, 351,) a decree was reversed, for the reason that an assignor of the subject of litigation in an original and cross-bill was not a party to either, and should have been made a party to the cross-bill, and that he might be made such a party. *Wickliffe v. Clay*, (*Id.*, 585,) was heard by consent only, without making a party that by the cross-bill appeared necessary, a new party by the cross-bill. In *Sharp v. Pike*, (5 *B. Mon.*, 155,) a new party was added by cross-bill, against his own express objection. In *Walker v. Brungard*, (13 *S. & M.*, 723,) new parties were added, and new matters brought in, by cross-bill, and heard without objection. In disposing of the case, the Chancellor, delivering the opinion of the Court, said, that, if they had been objected to, the new matters would all have been kept out, without saying that the new parties would have been. In *Costers v. Bank of Georgia*, (24 *Ala.*, 37,) it was expressly held that new parties should be added by cross-bill, when so interested in the litigation involved by it, as to be proper parties to it.

Opposed to all this, there is the remark of Mr. Justice Curtis, in *Shields v. Barrow*, (17 *How.*, 130,) and the reasons given by him in support of it, to the effect, that new parties cannot, in any case, properly be added by cross-bill, without citing any authority for it, and books and cases that have

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followed that remark without citing any other authority. That precise question was not involved in that case, but the mere *dictum* of such a judge of such a Court would ordinarily be followed, especially by lower Courts. An examination of his reasoning shows, that he made the suggestion without much examination, probably, and his reasoning does not cover the whole ground as to all classes of cases. The modes of procedure he suggests would probably be ample in all cases of cross-bills brought for discovery in aid of a defence merely to the original bill, but not in cases of those brought for relief as well as defence, where new parties would be necessary to the relief sought. As in this case, the methods he states as the proper ones, if successfully followed, would enable the defendant in the original bill to defeat the orator therein, but not to reach the affirmative relief prayed in the cross-bill, if entitled to it. Weighty as that remark is, it is not thought to be sufficient to control the reasons and authorities to the contrary of it. The result of what is thought to be the soundest reasoning, and the best considered authorities, is, that, where a cross-bill shows that there is a party to the subjects of the litigation as presented by it, who has not been before made a party nor appeared to be a necessary one, and then does appear to be such, that party should be brought in by the cross-bill.

The result is, that this cross-bill should be answered by all those made defendants to it. The demurrers are overruled, and it is thereupon ordered that the defendants to the cross-bill answer over.

Aldace F. Walker and *Chauncey Smith*, for the orators.

Wheelock G. Veazey and *Henry D. Hyde*, for the defendants.

CHESTER F. HARDON

vs.

ISAAC E. NEWTON AND OTHERS. IN EQUITY.

H., the owner of shares in the capital stock of a Connecticut corporation, filed a bill in equity against the president and the directors and the corporation, alleging acts of mismanagement and breach of trust on the part of the president and directors, and that the directors had sanctioned all such acts, and that a request to them to take proceedings for the relief of the stockholders, would be useless. The bill prayed for the dissolution of the corporation, and for the distribution of its assets among its creditors and stockholders, and for such further relief as the case might require. The defendants put in a plea, that, by the statutes of Connecticut, a Court of equity could dissolve a corporation only under certain specified circumstances, which did not exist in this case: *Held*, that the plea was good.

Held, also, that, on the facts set forth, the Court could prevent the continuance of the breach of trust, and could compel the officers to account for such as they had committed, but that, to obtain such relief, it should be specifically prayed for; and the plaintiff was given leave, on motion, to amend his bill in respect to the prayer for relief.

(Before SHIPMAN, J., Connecticut, January 14th, 1878.)

SHIPMAN, J. This is a bill in equity, which alleges that the plaintiff is a citizen of the State of New York, and is the owner of sixty-five shares of the capital stock of the American Suspender Company, a joint stock corporation organized under the statutes of the State of Connecticut, and established in Waterbury, in said State, of which corporation Isaac E. Newton is the president, and the other defendants are the directors. All the individual defendants are citizens of Connecticut. The defendant corporation manufactures elastic suspenders and webs. The bill further alleges, in substance, as follows: The defendants Newton, Merriman and Pritchard own the majority of the stock of said corporation. Newton has been its president for the past twelve years, and has practically controlled all its affairs, except the immediate supervision of the sales at the New York agency. The other directors, except

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said Merriman, have had no real part in the direction of the company, but have concurred in and sanctioned the acts which are complained of. Newton is incompetent for the position of president and manager of the company, and has managed its business in such manner as to cause losses, and has continued in important positions (1) one Dayton, who was known to Newton to be dishonest, and to be dishonestly using and disposing of the property of the company, and (2) one Judson, who was known to have been a dishonest man. Newton secured the election of said Merriman to be secretary and treasurer, although Newton had reason to believe, and had said that he believed, that Merriman was untrustworthy, and was using the company's funds for his own benefit. Newton has neglected to make certain lines and grades of goods which would have been, and which he knew would have been, profitable to the company. He has not allowed the books of the company to be audited, with the fraudulent design of concealing the true condition of its affairs from the stockholders. No dividend has been paid since the year 1866, when it was paid with borrowed money. Sundry specified statements of the pecuniary condition of the company, which were presented to the stockholders, were untrue, and were known to be untrue by those of the defendants who were directors at the time when the respective statements were made, and in their statements the assets were largely overvalued. By means of their wrongful acts, the corporation has been losing money, its debts have increased, and it is in danger of insolvency. The directors sanction all the wrongful acts, and a request to them to take proceedings for the relief of the stockholders would be useless. The bill prays for a discovery, and for the dissolution of the corporation, and the appointment of a receiver to distribute the assets among the creditors and stockholders, and for such further relief as the case may require.

The defendants have pleaded to the relief which is prayed for. The plea avers, that, by the statutes of the State of Connecticut, the Courts of equity of the State are empowered to dissolve a corporation, and to wind up its affairs, (1) on the

application of any shareholder of any corporation, if said Court shall find that said corporation has voted to wind up its affairs, or has abandoned the business for which it was organized, and has thereafter neglected, within a reasonable time, or in a proper manner, to wind up its affairs and distribute its assets among its stockholders; (2) upon the petition of one-third of the stockholders of any joint stock company; and that, under no other circumstances is a Court of equity of the State empowered by its statutes to dissolve a corporation. The plea further avers, that said Suspender Company has never voted to wind up its affairs, or to abandon its business, and that the plaintiff is not the owner of one-third of the capital stock of the corporation, and is not one-third of its stockholders.

The plea having been set down for argument and having been argued, the question of its sufficiency is now before the Court. The special relief which is prayed for is the dissolution of the defendant corporation, and the appointment of a receiver to divide its assets among creditors and stockholders, which division would be a practical dissolution. A Court of Chancery, by virtue of its general equity powers, in the absence of statutory provisions, is not authorized to dissolve a corporation, or to distribute the assets of a corporation, which is pursuing its ordinary business, among its shareholders, so as to effect a practical and actual dissolution. "A Court of equity may hold trustees of a corporation accountable for breach of trust, but cannot divest it of its corporate character and capacity," unless under the circumstances and in the cases in which the Court is specially empowered by statute. (*Angell & Ames on Corporations*, sect. 777; *Verplanck v. Mercantile Ins. Co.*, 1 *Edw. Ch. R.*, 84; *Att'y Gen'l v. Utica Ins. Co.*, 2 *Johns. Ch. R.*, 371; *Slee v. Bloom*, 5 *Johns. Ch. R.*, 366, 380; *Gaylord v. Fort Wayne &c. R. R. Co.*, 6 *Biss.*, 286; *Att'y Gen'l v. Reynolds*, 1 *Eq. Cas. Abr.*, 131.) The statutes of Connecticut have authorized the Courts of equity of this State to dissolve corporations and wind up their affairs, only in the two cases which have been mentioned. The circumstances which give a Court of equity in this State power to dissolve a corporation have not arisen in the case of the defendant company.

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But, a Court of equity of general jurisdiction has jurisdiction, at the instance of stockholders, to prevent a corporation and its officers from a wilful misapplication of the funds of the corporation, to the injury of the shares or the dividends of the stockholders, and from waste and misconduct which amounts to a breach of trust on the part of the managers, and from such acts as tend to the destruction of the franchises of the corporation, and to compel the officers to account for such waste or misconduct amounting to a breach of trust. (*Dodge v. Woolsey*, 18 How., 331; *Bacon v. Robertson*, 18 How., 480; *Robinson v. Smith*, 3 Paige, 222; *Heath v. Erie Railway Co.*, 8 Blatchf. C. C. R., 347; *Pond v. Vermont Valley R. R. Co.*, 12 Blatchf. C. C. R., 280.) And, if it affirmatively appears that the directors have refused to prosecute in the name of the corporation, or if the controlling directors of the corporation are themselves the wrong-doers, and must be made defendants, the suit may be instituted by a stockholder. (*Robinson v. Smith*, *Pond v. Vermont Valley R. R. Co.*, *Heath v. Erie Railway Co.*, cited *supra*.) In the last named case this branch of the subject was exhaustively examined.

It is insisted by the plaintiff that the plea should not be allowed, inasmuch as appropriate relief may be granted under the general prayer, if the allegations of the bill are sustained. "A plea to a bill in equity may be good in part, and not so in the whole; and the Court will allow it as to so much of the bill as is properly applicable, unless it contain the vice of duplicity." (*Kirkpatrick v. White*, 4 Wash. C. C. R., 595.) If the plea is allowed, the bill may be amended in respect to the prayers for relief, under Equity Rule 35. And, when the specific relief which is sought is not within the power of the Court to grant, and the defect has been pointed out by plea, it is just that the plaintiff should so amend his bill as to apprise the defendants of the hitherto undisclosed relief which he seeks to obtain. The defendants have successfully shown that the specific relief cannot be obtained, and the general prayer only remains. They are entitled to know the result which the plaintiff wishes now to accomplish. (*Langdell's Summary*

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of Equity Pleading, sect. 61.) The amended prayers should be consistent with the case which is made by the bill.

The plea is allowed, with costs, with liberty to the plaintiff, upon motion, to amend his bill in respect to the prayers for relief.

George H. Starr, for the plaintiff.

John W. Webster and *Stephen W. Kellogg*, for the defendants.

 ACTIEN-GESELLSCHAFT APOLLINARIS BRUNNEN

vs.

JULIUS SOMBORN AND LAZARUS SOMBORN. IN EQUITY.

The use, on labels and bottles, of the word *Apollinis*, in connection with the representation of a bow and arrow or anchor, was restrained, by preliminary injunction, on account of the similarity between them and the word *Apollinaris* and the representation of an anchor, as before used by the plaintiff, as being calculated and designed to induce the supposition, by users and dealers, that the waters of the defendant, so marked, were the waters of the plaintiff; but the plaintiff was ordered to give a bond to pay all damages to the defendant, if it should be finally determined that the plaintiff was not entitled to the injunction.

(Before WHEELER, J., Southern District of New York, January 16th, 1878.)

WHEELER, J. Upon the hearing of the motion of the orator for a preliminary injunction in this cause, it is considered, that the use, by the defendants, on their labels and bottles, of the word *Apollinis*, in connection with the representation of a bow and arrow, or anchor, as used by them, on account of the similarity between them and the word *Apollinaris* and the representation of an anchor, as before used by the orator, is calculated to lead those using and dealing in such waters, to suppose that the waters of the

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defendants, so marked, are the waters of the orator; and, as there is no other reason apparent, that the use of these symbols was adopted for that purpose. Wherefore, it is ordered, that, upon the filing a bond to the defendants, in such penal sum as shall be fixed by the clerk, as a master of this Court, with good surety approved by him, conditioned for the payment of all damages to the defendants, in case it shall finally be determined, in this cause, that the orator is not entitled to this injunction, a writ of injunction do issue, to restrain the defendants from the further use of the word *Apollinis*, and such representation of an anchor, or bow and arrow, in connection with the sale of their waters, until further order in the premises.

Rowland Cox, for the plaintiff.

Edward T. Bartlett, for the defendants.

THE UNITED STATES

v.s.

ALVIN GRAFF AND THOMAS OWEN.

G. and O. were indicted for a conspiracy with S. and others to defraud the United States out of the duties on silks and laces to be imported contrary to law. The indictment set forth several acts done by several of the accused to effect the object of the conspiracy. On the trial of G. and O., only one of such acts, an act of O., was proved. Other acts, not set forth, done by the defendants to effect the object of the conspiracy, were proved, to show its character. S. swore to an agreement made by him with O., who was the purser of a steamer, that O. should bring in goods, which S. should sell, for a commission. Under this agreement, O. brought in silks in barrels and cases, which S. disposed of, no duty being paid. S. sent the proceeds to O. W.

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was employed on O.'s steamer. S. swore that W. introduced him to O.; that he, in W.'s presence, agreed with O. to dispose of silks which O. should bring out in the same way W. brought out his; and that there was, at the time, an agreement between S. and W., whereby W. was bringing, in the steamer, silks which were landed without paying duty, and sold by S. At the trial, letters from W. to S. were admitted as evidence for the prosecution, to explain the nature of the importations by W., and of the agreement between S. and O., and to corroborate the testimony of S.

A witness was allowed to describe the marks on the heads of certain barrels, to identify them, without proving the destruction or loss of such heads.

A written statement made by O., describing his connection with S. in smuggling silks, was admitted in evidence against O. It was sworn to. When O. made it, he was not under arrest, but he had been told he was charged with being connected with smuggling. He made it freely, without the influence of threat or promise.

S., after the discovery of his guilt, fled, and wrote a letter to G., which never reached G. The letter spoke of O. and of the smuggling operations. There was evidence to show the connection of G. with O. and S., in the conspiracy. The letter, by its contents, was an act done in furtherance of the conspiracy, and was admitted in evidence against G. and O.

The evidence considered which warranted the jury in finding that G. was a co-conspirator with S. and O.

A variance between the indictment, and the evidence, as to the time when the alleged overt act was committed, is immaterial.

A party cannot wait until evidence is given, and the case of the other side is closed, and then produce a stipulation, as ground for striking out such evidence.

The prosecution put in evidence the manifest of the steamer, written by O., and filed in the Custom House. An affidavit endorsed on it, made by the master of the steamer, more than a month after such filing, was offered in evidence by the defence, and excluded.

(Before BENEDICT, J., Southern District of New York, January 22d, 1878.)

BENEDICT, J. This case comes before the Court upon a motion for a new trial. The defendants were charged with having conspired with one Scott and others, to defraud the United States out of the duties on silks and laces to be imported into New York from Great Britain, contrary to law. The indictment sets forth several acts done by several of the accused to effect the object of the conspiracy. Of the acts so charged, but one was proved—an act of the defendant Owen. Other acts, not set forth, done by the defendants to effect the object of the conspiracy, were proved, for the pur-

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pose of showing the character of the conspiracy. To sustain the indictment, Scott was called as a witness and testified to an agreement between himself and the defendant Owen, according to which Owen was, from time to time, to bring over in the steamship *The Queen*, such goods as he might desire to import, which goods Scott was to dispose of for him, receiving a commission on the proceeds, as his compensation. In pursuance of this agreement, at frequent intervals during several years, silks were imported without payment of duty, packed in barrels generally, sometimes in large cases. From the steamer the goods went to a certain express office, and thence, in most instances, to a place selected by Scott, where Scott unpacked the barrels, altered the marks on the goods, repacked them, and then sent them to auction houses to be sold. There was no evidence that, in any instance, Scott saw the goods before their arrival at the express office, and there was no evidence that Owen personally took any part in landing the goods, or in their subsequent disposal. There was evidence of the transmission of the proceeds of sales by Scott to Owen.

In the course of the trial, various questions of law were raised and decided, some of which I am now asked to reconsider. Of these questions, the first one presented on this motion relates to the admissibility of three letters written to Scott by one James Wells, dated respectively March 27th, April 1st, and May 1st, 1874. The admission of these letters as evidence against the defendants was objected to, but the letters were admitted. In order to exhibit the nature of the question raised by this objection, it is necessary to state, that there was evidence showing James Wells, the writer of the letters, to have been an employee on *The Queen*, of which vessel the defendant Owen was purser. Scott testified, that, in the year 1873, Wells introduced him to Owen, and, at that time, in Wells' presence, Scott agreed with Owen to dispose of silks which Owen then said he was going to bring out to this country in the same way Wells brought out his. In order to explain this direct evidence of an unlawful agreement between

Scott and Owen, and to answer the position taken by the defence, that the agreement thus testified to did not relate to goods to be smuggled, Scott further testified, that, at the time of the introduction to Owen, an agreement was subsisting between him and Wells, by which Wells brought out, on nearly every trip of the steamer, silks which were landed without payment of duty, and sold by Scott. The letters under consideration were offered as further evidence to explain the nature of the importations made by Wells, and, so, explanatory of the agreement made between Scott and Owen, and as corroborative of Scott's testimony. The ground of the objection to these letters is, that they were written at subsequent dates, refer exclusively to future transactions, and form no part of the *res gestæ*, because they are not contemporaneous with the conversation they are introduced to explain. But, I adhere to the opinion, that they are evidence to show the nature of the business in which Scott and Wells were engaged at the time of the introduction to Owen, and for the following reasons: The evidence showed the agreement between Wells and Scott to be a continuing conspiracy. It did not relate to any particular package of goods, nor was it limited to any time. The agreement was to dispose of such goods and all goods that Wells might thereafter import. This agreement, at the time of the introduction of Owen to Wells, as also at the dates of the letters from Wells, was still subsisting and in continuous operation. Letters interchanged between Wells and Scott, in furtherance of that agreement, tend to show its nature and object, whenever written. They show a course of business, pursued, so far as the evidence discloses, without change. Although written subsequently to the introduction to Owen, and speaking of transactions contemporaneous with their writing, they become evidence of the nature of the arrangement existing between Wells and Owen at the time of the introduction to Owen, it having been shown that the arrangement then subsisting continued unchanged in character beyond the period when these letters were written. It may be conceded that these letters are not competent as being the acts of a co-

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conspirator, nor were they admitted as such. Their admissibility rests upon an entirely different ground, namely, that they tended to show what Owen meant when he said to Scott that his silks would be brought out in the same way Wells brought out his. Furthermore, the letters in question clearly corroborate the testimony of Scott as to the nature of the arrangement existing between him and Wells. I cannot doubt, therefore, that these letters were properly admitted, as tending to show that the arrangement between Owen and Scott related to defrauding the Government of duties.

The next question presented on this motion is, whether it was error to permit a witness to describe the marks on the heads of certain barrels, without proof of the destruction or loss of the heads. I am unable to find error in this ruling. The point of inquiry was, whether certain barrels said by Scott to have been received at his place, were the same articles described on the manifest of the steamer *The Queen*, by certain shipping marks. The witness was allowed to describe the marks upon the barrels he received, for the sole purpose of identifying the articles. To such a question, the rule in regard to parol evidence of the contents of a document, has no application. Evidence of the character under consideration is properly admitted, when the object is to identify an article. Nor is the admissibility of such evidence confined to cases where the character of the article sought to be identified forbids its production in Court. In *Commonwealth v. Morrell*, (99 *Mass.*, 542,) such evidence was admitted to identify a tag. (See, however, *Regina v. Farr*, 4 *Foster & Finlason*, 336.)

The next point made is, that error was committed in admitting a written statement of Owen, describing his connection with Scott in smuggling silks. This statement was admitted as against Owen alone. It was made under the following circumstances: On the 2d day of July, 1877, Brackett, a special agent of the Treasury, detailed to investigate frauds on the Government, required Owen to accompany him to the Custom House. There Brackett told Owen that evidence existed of his connection with smuggling operations, and desired him to

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examine the documents showing such connection. Owen, after seeing the papers in Brackett's possession, expressed a willingness to answer any questions Brackett might put to him concerning the matter. Brackett, thereupon, put to Owen various questions touching his connection with smuggling silks, which questions, and the answers, as Owen gave them, were taken down in a narrative form. The statement, thus reduced to writing, was then read over to Owen, and signed by him. After it was so signed, Brackett administered to Owen an oath that the statement was correct, and certified, upon the statement, that it had been subscribed and sworn to before him, as special agent of the Treasury Department. At the time of making the statement, Owen was not under arrest. To the admission of this statement, as evidence against Owen, objection was made, upon the ground, that, having been sworn to, it must be deemed involuntary; and the case of *The People v. McMahon*, (15 N. Y., 384,) is referred to as authority for the proposition of law, that any declaration made by an accused party, when under oath, and conscious of being charged with crime, is to be deemed involuntary, and, therefore, inadmissible. The case cited must be considered as modified by the subsequent decision of the same Court, in the case of *Teachout v. The People*, (41 N. Y., 7,) where the reasoning of McMahon's case is criticised, and so far overthrown as to forbid its being relied upon to furnish the rule applicable here. I am aware of no authority binding on this Court, that forbids the admission of a statement like the one under consideration, nor does reason forbid. Certainly, the fact that a confession is made when under suspicion, does not render it involuntary. The contrary has been often decided. Nor can a confession be excluded by reason of the fact that the party making it was, at the time, under arrest upon a charge of having committed the offence. So it has often been ruled. It seems equally clear, that the fact of a statement being made under oath, does not prevent its being taken to be true. The reason why a sworn witness is permitted to decline answering, is, because his answers under oath can be used as evidence

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against him ; and, to say that the administering of an oath to one under suspicion of crime, will, of necessity, cause a mental disturbance that must render unreliable the sworn admission of the crime, and raise the legal presumption that the statement is untrue, is going further than I can go, unless compelled by authority. I know of no authority binding upon the Courts of the United States, which compels the holding that an arrest, or a charge of crime, or being sworn, or all three combined, are sufficient to exclude a confession that otherwise appears to have been freely made, without the influence of threat or promise. I agree entirely with the remark made by the Court, in *Shoeffler v. The State*, (3 Wis., 823,) in admitting a statement given under oath at a coroner's inquest, after suspicion had attached, that a person under accusation, and substantially in custody, may "be pressed with questions in such a manner, and under such circumstances, as to render his answers compulsory." Here, no such facts appear. The accused was in no way pressed. Being confronted with evidence of his guilt, he deliberately acknowledged it, and, his acknowledgment having been written out and read over to him, he then freely signed it, and, thereafter, he swore to the truth of the statement he had so made. Such a statement is, in my opinion, admissible and convincing evidence against the accused. I am aware that statements taken under oath, by committing magistrates of this State, are not admitted in evidence. But, the statute of the State forbids the taking of statements under oath, by committing magistrates, and, by implication, the use of such illegal statements, as evidence, is forbidden. The statement under consideration was not taken in violation of any law. On the contrary, the power to administer the oath is conferred by § 183 of the Revised Statutes ; and, as should be remarked, the statement contains information not only respecting Owen, but, also, respecting several other persons. The statements of the confession were pertinent to the inquiry then being prosecuted by the special agent—an inquiry in which, although it was, in no proper sense, a judicial proceeding, the agent was authorized by statute to ad-

minister an oath to any one supposed to have knowledge in respect to the matter in hand. For these reasons, I am of the opinion that the statement was properly admitted in evidence against Owen. It is proper to add, that, if the objection taken to the admission of the statement had been well taken, it was obviated by the offer of the District Attorney to withdraw the confession before it had been read. Of course, if, when the offer to withdraw the confession was made, the contents of the statement had in any way come to the knowledge of the jury, the offer would have been without effect. But, the objection to the admission of the confession was passed on by the Court at the termination of the day's sitting, and, the next morning, before any publication of the contents of the paper, and without any part of it having been read in presence of the jury, the District Attorney made a formal offer to withdraw the paper. To this the defendants objected, and, in point of fact, the contents of the paper first became known to the jury by its being read by the defendants' counsel. Under such circumstances, the objection taken by the defendants to the ruling of the Court upon the admissibility of the paper was rendered inoperative.

The next point made relates to the admission in evidence of a letter written by Scott and addressed to the defendant Graff. This letter was written and mailed by Scott at Troy, after his guilt had been discovered, and while he was on his way to Canada, in flight. It was addressed to Graff, and enclosed in a second envelope, addressed to one Nowell, a party cognizant of the frauds, and aware that Graff was in some way connected with or knowing to the same. The letter reached Nowell, but was stopped in his hands and never reached Graff. The following are its contents: "Dear Friend. Sold at last. Tell O. C. T. and E. H. O. to land nothing. This is a mystery to me. I suspect a party. Hope there was no trouble to N. & W. Saved by a hairbreadth. S." Prior to the offer of this letter, there was evidence to show that it had been arranged between Scott and Owen, that the letters O. C.

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T., when used in connection with their smuggling operations, should refer to the defendant Owen. There was, also, evidence for the consideration of the jury, to show Graff's connection with Scott and Owen, in the conspiracy. There being such evidence, the letter of Scott was clearly admissible against both Owen and Graff, if it was an act done in furtherance of the conspiracy. I ruled, upon the trial, that it was such an act, and for that reason admissible. To that ruling I adhere. The letter implies the existence on the steamer of goods intended to be landed in pursuance of the unlawful agreement, and it contains an express direction not to land the goods. The giving this direction was an act done to save from seizure, and to conceal, goods then forfeited to the United States by reason of their having been imported in pursuance of the agreement between those parties. Some goods had been seized, and Scott had fled, but, as to the goods referred to in the letter, the conspiracy was not at an end; for, the letter shows Scott endeavoring to procure action in respect to them, which endeavor, if it had been successful, would have saved from seizure goods that had become forfeited to the Government. Any act looking to the concealment of smuggled goods, so as to prevent their seizure, is an act in furtherance of the design to smuggle such goods. Upon this ground, the letter of Scott is admissible, and upon this ground alone was it admitted at the trial.

The next objection to be considered relates to the sufficiency of the evidence to warrant the jury in finding the defendant Graff to be a co-conspirator with Scott and Owen. As before stated, the evidence showed a continuing agreement between Scott and Owen relative to the smuggling of silks. This agreement was shown to have been entered into in 1873, and to have continued in operation up to the time of the seizure in 1876. Of the specific acts charged in the indictment as having been done to effect the object of the conspiracy, only one was proved, namely, the importation, without payment of duty, by Owen, in the year 1875, of 16 pieces of silk, in two barrels, marked [c]. The claim in behalf of Graff is,

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that there was no evidence to show him connected with the conspiracy prior to 1877; and it is, therefore, contended, that he was entitled to an acquittal, because no act specified in the indictment was done subsequent to 1875. The difficulty with this position lies in the assumption that there was no evidence from which the jury had the right to infer that Graff was a party to the conspiracy prior to 1877. Scott testified, that, in June, 1877, he met Graff, by appointment, at Nowell's place, which was the place used for the reception, unpacking and preparing for sale, of the smuggled goods. At that interview, Graff stated that he came "to find out what those large cases contained that Tom Owen brought, because Owen was only paying him the same price for landing a large case as he did for landing a barrel," and, "for landing a barrel, he got five pounds." This inquiry by Graff, while it proves that he was at that time a party to the conspiracy, plainly implies a previous and continued employment by Owen. It might naturally be taken to mean that he landed all Owen's barrels for five pounds per barrel. It shows, further, an intimate connection between Graff and Scott, who was the recipient of the goods smuggled by Owen, and distributor of the proceeds. There was, also, evidence of several meetings between Scott and Graff, at Nowell's place, in 1877, and as early as April of that year, under circumstances indicating a knowledge, on the part of Graff, as to the use to which the place was put by Scott. The further fact appeared, that, at the outset, Scott and Owen understood that Graff would land the goods smuggled by Owen, and that they acted upon that understanding. This is shown by Scott's testimony, that, upon the presentation to him by Owen of an invoice of silks—and, as I understand it, the first invoice after the making of the agreement—in answer to the inquiry when the goods would be landed, Owen replied, "it all depended upon Graff—when Graff said the word they would be sent to the express office." This declaration of Owen to Scott, made at the time of delivering an invoice, and for the purpose of enabling Scott to know when and where to go for the goods, is evidence to prove the fact,

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that, at the beginning of the conspiracy, Scott and Owen relied upon some other person, and that person Graff, to land the goods. This fact throws light upon the meaning of the language used by Graff in 1877, when he said that he got five pounds a barrel for landing the goods, and permits the inference that an agreement existed between Graff and Owen, in pursuance of which all Owen's barrels were landed by him for a compensation of so much a barrel. Furthermore, it was made plain by the evidence, that the assistance and connivance of some one on the dock, connected with the steamer, was necessary to effect the landing of the goods without discovery, and it was proved that Graff's connection with the steamer, and position on the dock, were such as to enable him to afford that assistance. From all these circumstances the jury were justified in concluding that Graff had rendered this assistance from the beginning. This view of the evidence renders it unnecessary to consider what would have been the result of a total failure of proof to show that Graff was connected with the conspiracy at the time of the commission of the only act charged in the indictment as done to effect the object of the conspiracy. I may, however, without intending to express an opinion upon the question, remark, that, if such proof be required, the requirement would seem to render it necessary, in order to draw an indictment, that the pleader should know the time when each party to a conspiracy joined himself thereto—a fact impossible to be known, in a case like the present.

The next question relates to the variance between the time when the importation set forth in the indictment, as made by Owen, to effect the object of the conspiracy, is charged to have occurred, and the time proven. It is supposed that the rule applied to an averment describing an act done to effect the object of the conspiracy, is different from that applied to the charge of the conspiracy itself; and expressions used by this Court in deciding the case of *United States v. Donau*, (11 *Blatchf., C. C. R.*, 168,) are relied on as supporting this position. All that was decided in Donau's case was, that, in an indictment for conspiracy, it was not necessary that particular

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acts stated in the indictment to have been done to effect the object of the conspiracy, should be so stated that the Court could see, from the face of the indictment, that the object of the conspiracy would be accomplished thereby. In the remarks there ventured in respect to the offence created by the statute, it is nowhere suggested that the time of the commission of such an act must be proved as laid. Nor do I see any reason for applying to this part of an indictment for conspiracy, a rule more strict than the rule applied to the statement of the conspiracy. The reasons which are the foundation of the rule, that a variance between the indictment and the evidence, in the time when the offence was committed, is immaterial, seem as applicable to the statement of the time when the overt act was committed, as to the statement when the conspiracy was formed. In indictments for the common-law offence of conspiracy, it is usual to state the conspiracy, and then show, that, in pursuance of it, certain overt acts were done; but no case has been cited where it has been held that a variance in the time of committing the overt acts was fatal. In high treason, the time at which the overt acts are alleged to have been committed need not be proved as laid; and it is sufficient if they be proved to have been committed at any time within three years before the finding of the indictment. See *Archbold's Crim. Pl.*, 17th Eng. ed., 723, where the law is so stated, and *Rex v. Charnock*, (1 Salk., 288,) *Rex v. Lord Balmerino*, (9 St. Tr., 587-605,) and *Rex v. Townley*, (*Fost.*, 7, 8,) are cited as authorities.

A different question, in respect to the time of the importation by Owen, arises out of the circumstance, that, before going to trial, the District Attorney, in answer to a motion to postpone, gave a written stipulation to admit certain facts in regard to a shipment, by Owen, of two barrels containing silks, marked [c], in which stipulation the shipment is described as having occurred in Liverpool about the middle of June, 1875. Assuming that the stipulation in question should be regarded as having the effect of a bill of particulars, and entitling the defence to insist that the evidence be confined to goods shipped

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in Liverpool in June, it does not follow that the defence were entitled to have stricken out the evidence given in respect to goods that arrived in New York in December, because, as was conceded by counsel on the argument, the objection to the admission of the evidence was not placed on this ground. When the evidence was admitted, the attention of the Court had not been called to the time mentioned in the stipulation, nor were the terms of the stipulation then claimed by the defence to have any bearing on the question of the admissibility of the evidence in respect to the importation of December. After the Government had closed its case, and after the announcement had been made, on the requirement of the defence, that no further evidence would be offered to prove the overt act in question, for the first time the attention of the Court was called to the time mentioned in the stipulation, and it was then insisted that all the evidence given in respect to an importation in December, must be stricken out and disregarded. But, it was too late then to bring forward the stipulation. A party is not permitted to wait until the evidence is given, and the case of the other side closed, and then, by producing a stipulation, make foundation for a motion to strike out. Furthermore, the importation set forth in the indictment is described by the vessel, by the character of the goods, by the manner in which they were packed, and by the mark [c]. The evidence admitted conformed in all these particulars to the indictment. It is a reasonable presumption that there was but one importation answering a description thus particular; and there has been no attempt to show, by affidavit, or otherwise, either that there were two such importations marked [c], or that the defendants were in any way misled by the difference in dates.

The only remaining question relates to the rejection of an affidavit of the master of The Queen, written on the manifest put in evidence by the Government. This manifest, being the document required by law to be made, and proved to have been written by the defendant Owen, and to have been exhibited and certified as required by law, on the arrival of

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the vessel, was introduced for the purpose of showing an importation of the two barrels marked [c], described in the indictment. Upon inspection of the document, there appears written thereon an affidavit made by the master more than a month after the manifest had been made and filed at the Custom House, in which affidavit the master states that certain of the goods mentioned in the manifest as composing the steamer's cargo, and, among them, two packages marked [c], were short shipped at Liverpool. Thereupon, it was insisted, in behalf of the defence, that this affidavit was part of the document, and legally in evidence as part of the case for the prosecution, although expressly excluded by the terms of the offer of the manifest in evidence; or, if not part of the case for the prosecution, that it might be read in evidence for the defence, without further proof. The affidavit was, however, rejected, and the correctness of that ruling is the point now to be considered. The ground taken is, that the subsequent affidavit of the master, written on the manifest, was part of the manifest. It is a self-disserving endorsement, it is said, and, in law, modified and controlled the prior statement of the manifest. In support of this position, reference is made to the case of entries of payment on a promissory note, or of satisfaction on a judgment roll. (*Lothrop v. Blake*, 3 Penn. State Rep., 483.) But, a distinction exists between the cases. This manifest is not produced by the master of the vessel, nor by any one deriving title from him, as foundation for any right. The document offered by the Government is the legal document required by law to be made, to show the goods on board the vessel, produced from the place of its legal deposit. The subsequent statement of the master, although written on this document, did not become part thereof. It was a mere statement of the master, attached, it is true, to the manifest, but forming no part of the legal document. It was part of another and different transaction, being the evidence adduced to explain to the authorities the discrepancy between the manifest and the officer's return, in pursuance of § 2887. I am unable to see

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any just ground for insisting that such a statement made *ex parte*, and without opportunity for cross-examination, is evidence as against the the Government, in a prosecution like the present.

I have thus considered all the questions to which my attention has been called upon this motion, and the result is, that no good ground for setting aside the verdict has been found. An order will, therefore, be entered, denying the motion. I further add, that I shall be prepared to hear a motion for sentence on Friday next, at the opening of Court. In thus fixing a time at which a motion for sentence may be made, it is not intended in any way to trench upon the domain of the prosecuting officer. In criminal cases, judgment is not pronounced unless moved for by the prosecuting officer, and, by omitting to bring up the prisoner, and declining to move for sentence, that officer may, to use the language of the books, "exercise a virtual prerogative of pardon." (*Petersdorff's Abridgment*, Vol. 10, p. 589, note, *Title, Information*.) Says the Supreme Court of the United States, in *United States v. Murphy*, (16 Pet., 203, 209 :) "Even after verdict, the Government may not choose to bring the party up for sentence." Nevertheless, it is proper that the time when such a motion will be heard, should be stated in all cases, in order that the making, or the omission to make, a motion for sentence, as the case may be, shall duly appear of record.

Benjamin B. Foster, (Assistant District Attorney,) for the United States.

Abram. J. Dittenhoefer, for the defendant.

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The Hopkins & Dickinson Manufacturing Co. v. Corbin.

THE HOPKINS & DICKINSON MANUFACTURING COMPANY

v8.

P. AND F. CORBIN AND OTHERS. IN EQUITY.

THE SAME

v8.

THE PARKER & WHIPPLE COMPANY AND H. J. P. WHIPPLE

The claim of the reissued letters patent, granted October 11th, 1875, to the Hopkins & Dickinson Manufacturing Company, as assignees of George McGregor and George Voll, for an "improved sash-lock or sash-fastener," (the original patent having been granted to said Voll and McGregor, as inventors, March 30th, 1869,) namely, "A vibrating lever, provided with a bolt, in combination with a striking plate or hook, and with a catch segment behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified," does not include a vertically moving bolt in combination with a socket upon the base-plate.

Where a patented invention is merely a combination subordinate to pre-existing devices, and has been limited to such sub-combination by the language of the claim, the patentee cannot successfully insist that he is entitled to cover by such claim the pre-existing devices; and this is true where one of the joint inventors of the junior invention is also the inventor of the senior invention.

(Before SHIPMAN, J., Connecticut, January 30th, 1878.)

SHIPMAN, J. These two cases are separate bills in equity, wherein the defendants in each case are charged with an infringement of reissued letters patent, dated October 11th, 1875, and issued to the plaintiffs, as assignees, by mesne assignments, of George McGregor and George Voll. The original patent to Voll and McGregor was dated March 30th, 1869. The invention is an improved sash-lock or sash-fastener. An ordinary form of sash-lock consists of a base-plate fastened to the top rail of the lower sash, a striking-plate or hook-plate

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fastened to the bottom rail of the upper sash, and a vibrating lever, which is pivoted upon the base-plate, and which engages with each plate so as to prevent either sash from being opened. In the invention which is described in the reissue, a bolt is mounted in and moves with the vibrating lever, which bolt slides backward and forward in a line parallel to the axis of the lever. When the lever is in proper position, as the bolt slides forward, it shoots beyond a catch segment or projection upon the base-plate, so as to hold the vibrating lever and prevent it from being turned until the bolt is retracted. When the bolt is retracted, and is disengaged from the catch segment, the vibrating lever can be turned and the sash can be opened. The improvement is one form of a self-locking sash-fastener, the object of which is to prevent the lever from being moved by a knife inserted between the sashes from the outside of the window. The claim of the reissue is "A vibrating lever, provided with a bolt, in combination with a striking-plate or hook, and with a catch segment behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified."

The defendants' devices are substantially alike. Each has a base-plate, a vibrating lever mounted upon the base-plate, a bolt mounted upon and moving with the vibrating lever, a striker-plate or hook, and a socket or depression upon the base-plate, so formed as to receive the bolt which moves up and down. The difference between the plaintiffs' and defendants' devices consists in the fact, that, in the defendants' devices, the bolt moves in a line perpendicular to the line of the lever, instead of moving in a line parallel to the line of the lever, and engages with a socket or depression upon the base-plate, instead of engaging with a projection from the base-plate. The defendants' bolt has a motion and is fastened, as a latch moves and is fastened. The main question is that of infringement; and it is practically conceded by the defendants, that the determination of this question depends upon the proper construc-

tion of the plaintiffs' reissued patent. In order to construe the claim, it is important to ascertain what was the actual invention of the original patentees.

A horizontally moving bolt, to lock the vibrating lever to the striker plate or hook, and a vertically moving bolt for the same purpose, were old in the art, and are mentioned in the specification of the reissue. In each of these devices, the bolt shot into a socket or depression upon the striker plate. In January, 1868, George Voll, one of the joint patentees, invented a sash lock, in which a horizontally moving bolt was received and was locked in a hole or socket in a "stump" or projection upon the base plate. Application was made by Voll for a patent, on February 25th, 1868, which application was rejected on August 6th, 1868, upon the ground that the invention had been anticipated in the patent of Brockseifer and Sargent, dated May 11th, 1858, one of the patents which are referred to in the plaintiffs' reissue. No appeal was taken. Twelve or eighteen of these locks were manufactured in February, 1868, by Voll, and were sent to the store of George McGregor, Voll's employer. What became of these locks does not appear. Two or three weeks after the rejection, Voll invented another sash-fastener, which consisted of a vertically moving bolt, which engaged with a catch segment or projection upon the base plate. A completed bolt of this kind was made, and the device was sent to a firm of patent solicitors, who reported that it was unpatentable. Voll and McGregor then united their skill and efforts, and invented the device which is the subject of this controversy, and for which a patent was issued to them jointly, on March 30th, 1869.

The invention of Voll and McGregor was the combination of a horizontally moving bolt and a catch segment upon the base plate. It was not broadly the transfer of a known locking device, and its equivalent, from the striker plate to the base plate. In January, 1868, Voll had transferred a socket from the striker plate to the base plate, and had connected a bolt with such socket. The second lock of Voll, viz., the

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combination of a vertically moving bolt and a projection upon the base plate, was a second stage in the improvement. The invention of Voll and McGregor was the final one of a series of separate inventions, in which series the prior inventions were made by one person before he was joined by his associate inventor. Each invention was distinct, and was separated from its successor by a completed, perfected and operative device. The prior inventions, although they may not have been abandoned by the sole inventor, were not included by the joint inventors in their joint invention. This is not the case of a joint invention which is the result of a progressive series of steps, which were taken by the two minds assisting each other in some degree. Neither is it the case of an invention which was completed by two acting jointly, after a series of experiments, not resulting in a perfected or an operative device, had been made by one of the inventors acting alone. In such a case, a Court does not carefully dissect the invention, to ascertain what parts of the whole were furnished by each person. In this case, Voll first invented a means of locking upon the base plate. Whether this invention was patentable or not under the claim in his application, it is not necessary to consider. He next invented another combination, by which the same result was produced. It is agreed that this invention was patentable. The joint inventors thereafter invented a third device, which was the combination of Voll's horizontal bolt and catch segment. This was the only result of the joint labors and inventive skill of the two inventors.

Having thus ascertained the exact extent of the joint invention, the question next arises as to the proper construction to be given to the joint patent. The specification which was attached to the application for a reissue, evidently contained, in the description of the device, the words "socket or depression." By an amendment of the plaintiffs, these words were erased wherever they occurred, and "catch segment" were substituted therefor, before the reissue was granted. The plaintiffs seek to have their claim so construed as

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to include within the patent a locking device, as well by means of a socket or depression upon the base plate, as by means of a projection thereon. The invention which was actually made by the joint patentees covers a very narrow ground. It is to be noticed, that the defendants do not attack the validity of the patent, if it is confined to the joint invention. This invention was not broadly the combination of the old ingredients of socket or projection, so arranged as to lock the lever upon the base plate, because, that combination had been made by Voll; but it was an improvement upon the combination of Voll, and was subsidiary to his second invention. The joint patent, being subsidiary to the prior invention of one of the patentees, should not be extended so as to embrace the original invention. "Where a combination of machinery already exists up to a certain point, and the patentee makes an addition or improvement to the machinery, he must confine his patent to the improvement." (*Barrett v. Hall*, 1 *Mas.*, 447, 476.) This limitation is sustained by the language of the reissue. If Voll had been the sole inventor and patentee of the joint invention, he might well have contended that his patent should be so construed as to embrace the different forms of locking devices upon the base plate which he invented, if such construction was not inconsistent with the language of his claim, and if he had not abandoned to the public any particular combinations, upon the principle, that "the actual invention of the party is a necessary auxiliary to the construction of the language which he has employed in describing it." (*Curtis on Patents*, sect. 453.) But, inasmuch as the joint invention was within a very narrow compass, and the devices which are now claimed to be equivalents had anticipated it, the joint invention should not be made to relate back and include the pre-existing devices, although they were the sole invention of one of the joint patentees. "It is impossible that one person can be, at the same time, the joint and the sole inventor of the same invention." (*Barrett v. Hall*, 1 *Mas.*, 447, 473.) It is not intended to suggest any modification of the well understood principle, that the in-

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ventor of a combination is entitled to invoke the aid of equivalents, (*Seymour v. Osborne*, 11 *Wall.*, 516,) but to simply assert, that, where an invention is merely a combination subordinate to pre-existing devices, and has been limited to such sub-combination by the language of the claim, the patentee cannot successfully insist that he is entitled to the pre-existing devices, and that this is true when one of the joint inventors of the junior invention is also the inventor of the senior inventions. Under this construction of the plaintiffs' reissue, the defendants do not infringe, inasmuch as they use a vertically moving bolt in combination with a socket upon the base plate.

It is insisted by the plaintiffs that Voll and McGregor are estopped to deny that they were the joint inventors of the patented invention. Neither of the joint inventors have made this denial. They have each denied that they were the joint inventors of the device which their assignees seek to have protected by the reissue, but which the inventors insist was simply an improvement of the sole and unpatented invention of one of them.

The testimony of Voll and McGregor is seriously criticised in connection with their alleged willingness to make oath, for a pecuniary consideration, to the application for a reissue, wherein the joint invention is stated so broadly as to include Voll's sole invention. I have not thought it necessary to pass upon this question of fact, as their present testimony is so corroborated by the exhibits in the case as to remove doubt in regard to the character of the sole and joint inventions.

Let a decree be entered dismissing the bill, with costs.

Charles F. Blake, for the plaintiffs.

Charles E. Mitchell and *Orville H. Platt* for the defendants.

Frese v. Biedenfeld.

J. C. FRESE & Co. vs. SHALBERG BIEDENFELD. IN EQUITY.

In a suit in equity, the proofs taken on the part of the defendant were not filed, because the examiner's fees had not been paid. The plaintiff moved for an order that such proofs be filed, and that an attachment issue against the defendant to compel payment of such fees: *Held*, that the motion must be denied.

(Before WHEELER, J., Southern District of New York, January 31st, 1878.)

WHEELER, J. This cause has been heard on the motion of the complainant to have the defendant's proofs ordered to be filed, and for an attachment to compel payment of the examiner's fees. Equity rule 82 requires a master to file his report whether his fees are paid or not, and provides for an attachment to compel payment. There is no rule requiring an examiner to file testimony taken by him, without payment of his fees. Doubtless he has a lien as against the party for whom testimony is taken, upon the testimony, for his fees; and, in addition to that remedy, he may proceed by application to the Court for an attachment to compel payment. (*Caldwell v. Jackson*, 7 *Cranch*, 276.) The other party can have no greater, if as great, right to the testimony. In this case, the other party claims that the testimony shall be put on file, not for the purpose of establishing his case, but that it may be overruled as showing a defence. It is doubtful whether he has any right to the testimony for that purpose, but, if he has, it must be subordinate to the right of the examiner to have his fees first paid. To order the testimony filed without payment to the examiner would cut off one of his remedies, and it may be a very useful one. If the party who has caused the testimony to be taken is willing or prefers to have his cause heard without it, the opposite party does not seem to have any just cause for complaint. If, however, he deems the testimony of sufficient value to him to be paid for by him, he may be entitled to have it filed on making the payment. But that is not

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his position on this motion. Here he asks to have it ordered on file without making payment, that it may be overruled as constituting a defence. That he does not appear to be entitled to.

Motion denied.

Arthur V. Briesen, for the plaintiff.

James L. Onderdonk, for the defendant.

GEORGE H. WOOSTER

vs.

EDMUND W. TAYLOR, JR. AND MARGARET WOODBURY.
IN EQUITY.

Where the profits made by a defendant from the unlawful use of a patented invention amount to more than the license fees for such use would amount to, the plaintiff, although exercising his monopoly by the granting of licenses, is entitled to recover such profits, on an accounting for profits, and is not limited to such license fees.

(Before WHEELER, J., Southern District of New York, February 15th, 1878.)

WHEELER, J. This cause has been heard on report and supplemental report of the master filed therein, exceptions thereto and argument of counsel. The reports show that the orator does not manufacture or sell his patented articles, but relies on license fees for his income from his patent; that such license fees, for the unlicensed use made by the defendants, paid at the beginning of each year, according to his rule, would amount to fourteen hundred dollars; that they were stopped soon after the commencement of the second year, by

an injunction issued in this cause, on motion of the orator; and that the profits actually realized by the defendants, from the use they had, amounted to nineteen hundred sixteen dollars and twenty-eight cents. Among other exceptions, the defendants have filed some that raise the question whether the orator is entitled to recover anything beyond the amount of what his license fees would have been; and, if not, whether those should not be apportioned to the time they were suffered to use the invention. No other exceptions, besides those raising these questions, are insisted upon.

If the defendants had yielded to the orator's claims, and taken and paid for the licenses, the profits realized would have been theirs, and the orator would have had no just claim upon them. As they did not, the use they had of the invention was not theirs, but was the orator's, and what they realized from it, by force of the law, became his, and was not their own. By the express provision of the statute on this subject, the plaintiff is "entitled to recover, in addition to the profits to be accounted for by the defendant," the damages sustained by the infringement. (*Rev. Stats. U. S., sec. 4921.*) This shows, that, in contemplation of law, the profits actually realized by the infringer belong to the patentee, and, that, when the profits would not compensate for the damages sustained, as they might not, in many cases, he is entitled to the damages beyond.

When it comes to the measure of damages, as distinguished from profits, in cases like this, the loss of the license fees might be the limit of the patentee's loss. But they are not, in any such case, the measure or limit of the infringer's gain. So, on many questions of damages strictly such, the license fees are evidence of damage, and, sometimes, the limit of recovery of damages, but cannot be evidence, and, much more, not a limit, of profits to be accounted for.

If the question of damages beyond profits was reached, and of any importance, it may be that the stoppage of the use of the patent by the injunction would make an apportionment of the license fees lawful and proper. But, as the profits ex-

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ceed the damages, in any mode of reckoning the license fees, it is not necessary to consider the question made in that respect.

The exceptions are overruled, and the reports accepted and confirmed for the larger sum.

Frederic H. Betts, for the plaintiff.

James M. Townsend, for the defendants.

ROBERT W. ABORN AND OTHERS

vs.

JOHN W. MASON, ASSIGNEE IN BANKRUPTCY OF LOUIS H. OBERHOFER.

A. delivered wool and yarn to O., to be made into cloth, at a specified cost, to be paid by A. The wool and the yarn and the goods were to be continuously the property of A. O. began the manufacture of goods from the materials. Thereafter, the property came into the possession of M., as the assignee in bankruptcy of O. At that time, it was in the condition of dyed wool, mixed with shoddy, and woollen yarns in the various stages of manufacture into cloth, and was of small market value, and not salable. A. demanded from M. the specific wool and yarn delivered to O., and the yarns in process of manufacture, and offered to pay all charges on them, if informed of the amount. M. completed the manufacture of the goods, and expended \$800 in finishing them, and sold them for \$3,193 50. A. sued M. in trover, for the conversion of the wool and yarns and goods: *Held*, that it was not necessary for A. to prove an actual tender of an amount sufficient to cover the value of the work and materials supplied by O., but that the offer made to pay the charges was sufficient.

Held, also, that A. was entitled to recover the avails of the goods, less the cost of the materials furnished by O. and by M., and the expense of manufacture.

(Before SHIPMAN, J., Southern District of New York, February 23d, 1878.)

SHIPMAN, J. On or about May 6th, 1871, the plaintiffs were the owners of a quantity of superfine wool and of inferior wool and of double and twist yarn upon spools, of the value of \$1,737 69, and delivered the same to Louis H.

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Oberhofer, a woolen manufacturer of Canterbury, Connecticut, to be manufactured by him into cassimeres, at an estimated cost of twenty-one cents per yard, to be paid by the plaintiffs. The wool and the yarn, and the goods which were to be manufactured therefrom, were to be continuously the property of the plaintiffs. It was supposed that this wool would make about 5,000 yards of cloth. Oberhofer received the materials in his factory, and commenced the manufacture of goods therefrom. About May 25th, 1871, all the property in the possession of Oberhofer was attached and remained under attachment, or in the possession of the United States Marshal, by virtue of a warrant in bankruptcy, until about August 31st, 1871, when the property came into the possession of the defendant, who had been theretofore duly appointed assignee in bankruptcy of Oberhofer's estate. On this date, there were upon the premises neither wool in bags nor cotton yarn upon spools, but the goods which had been sent by the plaintiffs were upon the machinery of the factory, in the form of dyed wool mixed with shoddy, or of woolen yarns in the various stages of manufacture into cloth. The market value of this woolen yarn and wool in process of manufacture was small, as the materials were in such a condition that they were not salable. The assignee estimated, that the unfinished goods were not worth over \$100, and would scarcely bring that sum, if he should attempt to sell them in their unfinished state. Another witness estimated the value at from \$300 to \$500. A few days after September 14th, 1871, the assignee obtained authority from the District Court to complete the manufacture of these goods by the purchase of the necessary additional material, and the employment of the necessary labor. On September 15th, 1871, the plaintiffs made a written demand upon the defendant for the delivery to them of the specific bales of wool and spools of cotton yarn which they had delivered to Oberhofer, and offered to pay all charges, expenses and liens which the bankrupt, or the defendant, as assignee, had upon said merchandise, and, as they were ignorant of the amount of such charges and liens, asked to be

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informed of the amount, that they might tender and pay it. There was also some testimony to the effect that, at the same time, one of the plaintiffs verbally informed the defendant of the fact that the wool and yarn were in process of manufacture, and notified him that they were seeking not only the wool existing in specie, but wool and yarns in process of manufacture. Testimony was also given by the defendant, to show that the plaintiffs were insisting, until the commencement of the suit, that their wool was in the factory in its original form, and was easily distinguishable. The defendant did not comply with the demand, but completed the manufacture of the unfinished goods, at an expense of \$800. The goods were finished about the middle of October, 1871. All the goods which were thus manufactured, and the goods which Oberhofer had finished from other wool, were sold for the defendant, who received the sum of \$3,193.50, therefor.

The plaintiffs brought an action of trover, on December 9th, 1871, against the defendant, for the conversion of the wool and cotton yarns which they had delivered to Oberhofer. The declaration was subsequently amended, so as to allege the conversion of "certain yarns, and goods made from said wools and said double and twist yarn, one or both." Upon the trial of the case to the jury, they were instructed, that, the property having come rightfully into the possession of the assignee, the demand upon him should have been in such terms as to apprise him of what he was claimed to be wrongfully detaining from the plaintiffs, and he should have been informed in such manner as to enable him to understand the kind of property which was demanded; and that, if the written demand was the only demand which was made, or notice which was given to the assignee, the plaintiffs could not recover. The jury were also instructed, that if, in addition to the written demand, the assignee was informed by the plaintiffs, that they were seeking to obtain from him, and that they demanded of him, the woollen yarns and wool, in the various stages of manufacture, which Oberhofer had been manufacturing for them under his contract, then, if the assignee, after such

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notice and demand, completed the manufacture, and sold the manufactured goods, he would be liable, provided such goods were made from their yarn.

Two questions of fact were submitted to the jury: 1st. Was such a demand made by the plaintiffs? 2d. Were the goods which were in process of manufacture in the mill of Oberhofer, at the time of the appointment of the assignee, the property of the plaintiffs? If both these questions of fact were found for the plaintiffs, the jury were instructed, upon the question of damages, that the circumstances of the case were peculiar, and that, in the ascertainment of damages, they should deduct from the avails of the manufactured goods the entire cost of the materials furnished by the assignee or by Oberhofer, and the expense and cost of manufacture. The jury returned a verdict for the plaintiffs, for \$2,367 49.

Upon a motion for a new trial, the defendants insist, (1.) that the demand of the plaintiffs was limited to wool and cotton yarn; and that, upon such a demand, the defendant, having come rightfully into the possession of the property, cannot be found to be a wrong-doer, for a conversion of property which did not correspond with the demand, and which he did not know was claimed by the plaintiffs. The jury were instructed in accordance with the principle of law which is claimed by the defendant, but they found, as matter of fact, that the plaintiffs verbally demanded of the defendant woollen yarns which were in process of manufacture. The jury evidently believed that the defendant was apprised by the plaintiffs of the exact property which they claimed he was wrongfully detaining from them.

(2.) It is claimed, that, for the value of the work and materials which were supplied by Oberhofer, the defendant, as his assignee, had a lien, at the time of the demand, upon the property of the plaintiffs; that it was incumbent upon them to make an actual tender of an amount sufficient to cover this lien; and that an offer to pay, or a readiness to pay, did not comply with the necessity of an actual tender of money. Oberhofer had agreed with the plaintiffs to manufacture their

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wool into cassimeres. They had agreed to pay him a stipulated price for the labor and the materials which he should furnish. His duty was to deliver the manufactured goods, and their duty was to pay the price of manufacture. These obligations were mutual and concurrent. The payment of the cost of manufacture, and the delivery of the goods, were concomitant acts. In the case of mutual and concurrent promises, "the word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender, in the sense in which those terms are used in reference to the kind of agreements which we are now considering." (*Smith v. Lewis*, 26 Conn., 110; *Adams v. Clark*, 9 Cush., 215; *Tate v. Meek*, 8 Taunt., 280.)

The defendant next insists, that the liability of the defendant was limited to the value of the property in its condition at the time of the conversion, and that the uncontradicted testimony showed that such value did not exceed \$500. The general rule of the common law, in regard to title by accession, is, that whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing has been annexed to and made part of some other thing which is the principal, or its nature has been changed from personal to real property; "but, if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives or wheat, it belonged

to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted." (2 *Black Comm.*, 404; 2 *Kent's Comm.*, 364; *Silsbury v. McCoon*, 6 *Hill*, 425; *Woodruff & Beach Iron Works v. Adams*, 37 *Conn.*, 233.)

In this case, the property, at the time of the conversion, consisted of woolen yarn and wool in the various stages of manufacture into cloth. The property was, in fact, unfinished woolen cassimeres, and was described to be such by the assignee, in his testimony before the District Court, upon his application for leave to complete the manufacture. By the labor and materials which were furnished, unfinished goods became finished. The species of the property was not changed, and the identity of the materials, as they existed at the time of the conversion, was not lost.

It has frequently been held, that the person whose property has been tortiously taken, is entitled to the enhanced value, until it has been so changed as to alter the title, or to destroy the identity of the property. (*Betts v. Lee*, 5 *Johns.*, 348; *Curtis v. Groat*, 6 *Johns.*, 168; *Brown v. Sax*, 7 *Cowen*, 95; *Baker v. Wheeler*, 8 *Wend.*, 505.) But Courts have not been satisfied with a rigid rule, which would invariably permit a plaintiff to recover the enhanced value, without any deduction for the labor and expenses which, in the absence of fraud, have been bestowed upon such property by the defendant, and have not enforced the rule to its full extent. (*Wood v. Morewood*, 3 *Ad. & El.*, *N. S.*, 440; *Hilton v. Woods*, *Law Reports*, 4 *Equity Cases*, 433; *Benjamin v. Benjamin*, 15 *Conn.*, 347; *Silsbury v. McCoon*, 4 *Denio*, 332.) Instances can easily be imagined, where a rigid enforcement of the rule would work hardship; and, in this case, the plaintiffs did not ask the Court to charge that they were entitled to the enhanced value of the manufactured goods, without reference to the expenses of manufacture.

The rule which was given to the jury was adopted in the case of *Morgan v. Powell*, (3 *Ad. & El.*, *N. S.*, 278,) an action of trespass for digging coals in the plaintiff's mine. The

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Court determined that the value of the plaintiff's coals was the sale price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine where they were dug, to the mouth. Under the circumstances of this case, the allowance for the defendant's labor and expenses was eminently just. Wool had been delivered to be manufactured into cloth. It was in a partial state of manufacture when the assignee took possession, labor, skill and materials having been expended upon it by the bankrupt. At this time the materials were in such a condition that they had very little salable value; and, in order to make the property a merchantable article of value, more materials must be purchased, labor must be employed, and time must be expended. The deduction is fully justified by the decisions which have been cited.

The motion for a new trial is denied.

Michael W. Divine and Aaron P. Whitehead, for the plaintiffs.

John E. Parsons, for the defendant.

THE EMMA SILVER MINING COMPANY

vs.

TRENOR W. PARK AND H. HENRY BAXTER.

The trial before a jury of an action at law, in this Court, occupied nearly four months, being portions of three terms of the Court. After the final adjournment of the term at which the verdict was rendered, which was for the defendant, a stay on the verdict was granted, and, by order, the time for the plaintiff to make a case was extended, and the stay was continued, by order, until the hearing and decision on a motion for a new trial: *Held*, that the motion for a new trial, on a case, before judgment, could be entertained after the expiration of the term at which the action was tried; and that the practice pursued was regular.

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All motions, in a suit at common law, which are required, by the practice of the State Courts of New York, to be made at a special term of a State Court, may be made at a stated term of a Federal Court.

In a suit to recover damages for the alleged fraudulent sale to the plaintiff by two defendants, of a mine, the plaintiff introduced evidence to show a fraudulent intent in the vendors, consisting of statements made to them, or one of them, unfavorable to the character and value of the mine: *Held*, that the defendants, in reply, had a right to show the statements of third persons, made to them, prior to the sale of the mine, in regard to its character and value.

P., one of the defendants, was a director and a shareholder in the plaintiff corporation. At the trial, the plaintiff offered in evidence the minutes of a meeting of the plaintiff's board of directors, held in England, nearly a year after the sale of the mine, and at which P. was not present, and when he was absent from England, with a view to charge him with knowledge of the contents of a telegram sent to the directors by the president of the company, and of the action of the directors thereon: *Held*, that the evidence was not admissible.

Letters written by P. to his co-defendant, while they owned the mine, and during the period when it was claimed by the plaintiff they were getting up a fraudulent scheme to sell the mine to the plaintiff, the letters purporting to state what was transpiring at the time, and speaking of its development and value, were admissible in evidence in favor of both defendants.

The verdict of the jury was upheld, as not contrary to the evidence, and the charge of the Court to the jury was upheld, as not unjust to the plaintiff.

The suit being one in which it was alleged that the directors of the plaintiff corporation were induced to purchase the mine by the fraudulent representations or concealments of the two defendants, as vendors, regarding material facts, and they being two of such directors at the time of the sale of the mine, it was held, that if the defendants withheld from their co-directors any information as to material facts affecting the mine, intending thereby that their co-directors should be misled, their conduct was actionable concealment, if it operated to induce the purchase.

(Before WALLACE, J., Southern District of New York, March 2d, 1878.)

WALLACE, J. Preliminarily to the consideration of the merits of the motion now made for a new trial, the question arises whether the proper practice has been pursued here for the purpose of a review. The trial of the action was commenced in the October term and occupied nearly four months, being protracted throughout the October term and after the February term and the April term had intervened. As soon as the verdict of the jury was rendered, the term was adjourned without day. After this, a stay of proceedings upon

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the verdict was granted, and, by order, the time for the plaintiff to make a case was extended. By a subsequent order, the stay was continued until the hearing and determination of a motion for a new trial. It is now insisted, on behalf of the defendant, that a motion for a new trial, upon a case, cannot be entertained after the expiration of the term at which the action was tried; that the only method of review is by a petition, after the entry of judgment; that the orders staying proceedings upon the verdict were unauthorized and of no effect; and that all the proceedings towards a review should be dismissed. I am not of this opinion, and hold that the motion is properly here and must be entertained and determined upon its merits. Whether the practice upon such a motion has been changed by § 5 of the Act of Congress of June 1st, 1872, (17 *U. S. Stat. at Large*, 197, now § 914 of the *Revised Statutes*), conforming the forms and modes of proceeding in civil causes, other than equity and admiralty causes, "as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of record of the State," or remains as it was before that Act, is not material. The motion is properly here under the former practice, and also under the practice of the Courts of this State.

The power "to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law," is expressly conferred upon the Courts of the United States, (*Act of September 24th*, 1789, § 17, 1 *U. S. Stat. at Large*, 83, now § 726 of the *Revised Statutes*), but the procedure for a motion for a new trial has not been prescribed by any statute, except where the application is made after judgment, in which case the application is required to be made by petition. (*Act of September 24th*, 1789, § 18, 1 *U. S. Stat. at Large*, 83, now § 987 of the *Revised Statutes*.) The Courts of the United States had been accustomed to grant new trials according to the practice of Courts of common law, prior to the enactment of the statute allowing motions to be made after judgment; and the effect of that statute was not to abridge any remedy theretofore ex-

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isting, but, as theretofore such reviews could not be had after judgment generally, but only in exceptional cases, the true interpretation of the statute is, that it enlarged the existing remedy, so that, in furtherance of justice, the technical rule by which a review was precluded after judgment should no longer obtain. It would be opposed to every principle of construction, to decide that a statute which confers a new remedy, by implication abrogates a pre-existing remedy, where no language from which such intent can be plainly inferred is used. It is not to be doubted, therefore, that a motion for a new trial need not be based upon petition, except when made after judgment.

But, it is strenuously contended, that this Court has no authority to permit a case to be made, or to stay proceedings upon a verdict, after the expiration of the term at which the action has been tried. The authority has been so uniformly exercised by this Court, that it hardly seems necessary, at this late day, to discuss the propriety of the practice. The right to control their own process and judgments, so as to promote justice, has always been recognized as one of the inherent powers of every Court of general jurisdiction, in the absence of any statutory limitation or prohibition; and the practice of granting new trials took its origin from this authority. It is a mistake to suppose that such motions could only be entertained at the term when the action was tried. According to the later common law practice, although the motion was usually made pending the four days of the rule *nisi*, it was also entertained for good cause after the expiration of the four days, and, if the delay was sufficiently excused, such motions were entertained at the next term, or even at subsequent terms. There was never any question of the power of the Court to grant a new trial at a term other than that of the trial. As the motion could only be made before judgment, the power to stay proceedings on the verdict was necessarily included, and, in the control over their own judgments, the granting of stays upon verdicts and of motions for a new trial rested simply in judicial discretion. Originally, motions for a

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new trial were made on the notes of the judge who tried the cause, and out of this practice grew that of making a case; and the time for making a case was always subject to the discretion of the Court, and there was never any doubt but that leave to do so could be granted after the term had expired.

As judgment has not been entered in this case, the motion is regular, and, even if it should be determined that the stay of proceedings was irregularly granted, or was granted without authority, as it was not set aside when the motion for a new trial was made, if it should now be set aside, it would not avail the plaintiff.

It is urged, that the practice relative to new trials is now regulated by the Code of Procedure of this State, by force of the Act of Congress of June 1st, 1872, before referred to; and that, under the Code, the motion for a new trial must be made at a special term. Conceding, for argument, this to be so, inasmuch as this case was heard by consent before the judge who tried the cause, at chambers, before the regular term, for the convenience of the counsel for the parties, it is to be considered as though made at the regular term; and I entertain no doubt, that, if made at a stated term, the motion could be entertained, and the practice would "conform, as near as may be," to that prescribed by the Code, and that all motions which, by the Code of Procedure, must be made at a special term of the State Courts, may be properly made at the stated terms of the Courts of the United States.

Passing now to the consideration of the motion upon its merits, the first questions to be disposed of are those arising upon the rulings at the trial, in the admission and exclusion of evidence. The defendants were permitted to show, against the objection of the plaintiff, the statements of third persons made to the defendants prior to the sale of the mine, in regard to its character and value. Under the declaration, it was essential for the plaintiff to show a fraudulent intent on the part of the defendants at the time of the sale of the mine. It was alleged, that the defendants originally purchased their interest in the mine for the purpose of a fraudulent sale; that they

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worked the mine to promote this scheme; and that they sold it to the plaintiff by fraud and deceit, and in consummation of their original fraudulent scheme. A large part of the evidence introduced by the plaintiff was received for the sole purpose of showing a fraudulent intent on the part of the vendors, and a part of this evidence consisted of statements made to them, or one of them, by various persons, unfavorable to the character and value of the mine. To meet this, the defendants introduced evidence consisting of the statements of various persons, whose knowledge of the property entitled them to speak with more or less weight, made to the defendants prior to the sale of the mine, relative to its character and value. The belief of the defendants was one of the vital issues of fact to be determined. It is not material how such belief originated or was induced, if it was honestly entertained. If it had been induced by the formal reports of experts employed by the defendants for the express purpose of ascertaining the character and value of the mine, it would have been entitled to more weight than when predicated upon less reliable information, but the weight of the evidence, how far the information was influential with the defendants, was for the jury to determine, and not for the Court. The inquiry related to the state of mind of the defendants, and that could only be arrived at by presenting to the jury all the information, irrespective of its source, which could reasonably have influenced the judgment of the defendants. It would have been error to exclude the evidence. (*Ponsonby v. Debaillon*, 6 *Martin's Louis. Rep.*, N. S., 238.)

The next ruling impugned, is the exclusion of the minutes of a meeting of the board of directors of the plaintiff, held nearly a year after the sale of the mine. It was sought, by this evidence, to charge the defendant Park with knowledge of the contents of a telegram sent to the directors by the president of the company, and with knowledge of the action of the directors upon the receipt of the telegram. Without discussing the relevancy of the evidence, it suffices to say, that, while Park, as a director and shareholder, was bound by the acts of

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his co-directors, to the same extent as if he had been present at the meeting, the entry in the minute books affords no presumption of knowledge of what transpired at a meeting held after he had left England, and where the circumstances repel all inferences of personal knowledge.

The two rulings thus adverted to are the only ones in the course of the long trial which are now pressed as erroneous. It is not claimed that any error of law was committed in the instructions to the jury, except, that, incidentally, in commenting upon the facts, certain letters written by the defendant Park to the defendant Baxter, which had been admitted as evidence in favor of Baxter, were treated by the Court as evidence generally in the case, and, consequently, as evidence in favor of the defendant who wrote them. If the attention of the Court had been called to this inadvertence at the time, it would have been promptly corrected, and the jury would have been advised in conformity with the ruling when the letters were received in evidence. But, treating the instruction as one which, though not excepted to, should, if erroneous, be regarded, for the purposes of a motion for a new trial, as a misdirection, it can be sustained as correct, upon the broad ground that the letters were entitled to be received and considered as evidence in favor of Park. These letters were written from Park, at Salt Lake, to Baxter, in New York, in the course of a frequent correspondence between them, after the defendants had purchased their interests in the mine, and during the period when, upon the theory of the plaintiff, the defendants were engaged in manipulating the mine for the purpose of a fraudulent scheme which was consummated by the sale to plaintiff. The letters purported to convey information of what was transpiring at the time, advices of the developments, indications and value of the property, and suggestions as to future operations. It was conceded, upon the argument, that these letters would have been admissible as against Baxter, irrespective of the fact whether he had ever received them or not, as the declarations of a confederate, as verbal acts pending the criminal enterprise and in the accom-

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plishment of its objects. If this is correct, if they were admissible, not as admissions of a party to the record, and, therefore, competent against him, within one of the exceptions to the rule excluding hearsay, but as verbal acts, and, therefore, not hearsay at all, it would seem entirely clear that they were competent in favor of Park, to the same extent and in the same manner that proof of any acts or conduct on his part, indicative of good faith or inconsistent with a fraudulent purpose, would be competent. Declarations of one conspirator are admissible against another conspirator, only as part of the *res gestæ* of the criminal enterprise, and, when declarations are admissible as *res gestæ*, they are always admissible in favor of the party making them as well as against him. From their nature, they are evidence, though emanating from the party who seeks to use them for his own benefit. (*Fellowes v. Williamson*, 1 *Mood. & Malk.*, 306; *Atwood's Case*, 4 *City Hall Rec.*, 91; *Mezrara's Case*, 2 *Id.*, 113; *Shenck v. Hutcheson*, 2 *N. C. Law Repository*, 432; *Taylor v. Church*, 4 *Seld.*, 452.) It is upon this rule that the character of the possession of real estate may be explained by the declarations of the possessor, the occupancy being the principal act, and the declarations accompanying it a part of the *res gestæ*. Yet these declarations are evidence in favor of the party making them. (*Martin v. Simpson*, 4 *McCord*, 262; *Turpin v. Brannon*, 3 *McCord*, 261.) So, where letters were written by the defendant in respect to property which he claimed to hold as an agent of the Government, they were received in evidence in his own favor, and the Court said, that "his contemporaneous correspondence on the subject, in that character, with the American Government, was certainly proper evidence to show the original nature and complexion of the facts in controversy." (*Bingham v. Cabbot*, 3 *Dall.*, 19, 39.) Upon the same rule, letters written by the owners of a vessel to the master, giving instructions as to the objects and character of a voyage, are admissible as part of the *res gestæ*, in their own favor, to disprove an unlawful enterprise. (*United States v. Libby*, 1 *Wood. & M.*, 221.) An interesting case illustrating

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the rule is *Thompson v. Saltmarsh*, (14 *Sergt. & Randle*, 275,) where a gratuitous bailee, who sued for the loss of a deposit, was permitted to show his own letters and declarations to third persons, after the loss and prior to any claim made upon him, in support of the theory that the money had been stolen from him, upon the ground that they were a part of the *res gestæ*. Numerous other illustrations of the rule are furnished by the cases, but it is sufficient to refer to one only, that of *Rex v. Whitehead*, (1 *C. & P.*, 67,) which is directly in point here, where the defendant, on trial for a conspiracy to defraud, was permitted to introduce letters written to him and by himself to an alleged confederate, for the purpose of showing that he believed the truth of the facts which it was charged he had fraudulently represented.

Having thus reached the conclusion that the motion for a new trial, in so far as it is predicated upon errors of law, cannot prevail, it only remains to determine whether the verdict of the jury should be set aside as contrary to the evidence, or because the charge of the judge, so far as it dealt with the evidence and theories of fact, was unjust to the plaintiff. The vast volume of evidence and the great length of the charge preclude an analysis or consideration of either in detail, although the great importance of the controversy demands and has exacted a careful re-examination of the whole case. After a thorough review of the evidence and of the charge, my conclusion is, that a case is not presented for a new trial, within any of the rules which authorize a verdict to be set aside. In hard actions, a new trial will not be granted, if the verdict be for the defendant, although against evidence; and actions where fraud is imputed are within this rule. (*Graham on New Trials*, 523.) But, irrespective of the character of the action, a case is not presented here where the verdict is so manifestly against the weight of evidence as to raise a presumption of partiality or misapprehension on the part of the jury. Inasmuch as there was evidence on both sides, upon the several issues of fact, if there were a preponderance against the verdict, the Court should not reverse the conclusions of the

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jury, in the exercise of that discretion which is a judicial and not an arbitrary one. It would be unfair to the defendants not to say, further, that the case presented a fair question of fact for the jury to determine, depending upon the credibility of witnesses and the probabilities to be deduced from circumstantial evidence, and is not one where the intelligence or impartiality of their verdict can fairly be impugned.

I am unable to discover any fair ground for the complaint, that the drift of the charge was adverse to the plaintiff, and that the comments on the evidence were calculated to mislead the jury in their consideration of the facts. The charge must be judged in its entirety and not in detached parts. After it has been dissected, it requires no astuteness on the part of counsel to discover parts which are obnoxious, when disconnected from the rest. That inaccuracies and omissions in the recapitulation of the testimony are to be found, is, doubtless, true; that theories and suggestions upon the facts were advanced, some of which could have been modified or qualified to meet other theories and suggestions fairly presented by the testimony, is, also, doubtless, true; but, in view of the great length of the trial, the vast mass of oral and documentary evidence to be considered, and the unusual number and variety of the issues of fact, primary and collateral, involved, it is hardly to be expected that a presentation of the case could be made, that would not, in some respects, be inadequate or inaccurate. These inaccuracies were not challenged at the time, none of them, in my present judgment, were serious ones, the prominent issues in the case were quite carefully enforced upon the consideration of the jury, and, as a whole, the charge was a fair and careful presentation of the case.

In conclusion, it is proper to say, that the evidence discloses many circumstances connected with the sale of the Emma Mine, which strongly impeach the honor and morality of the transaction, but which are to be eliminated from the case, except so far as they bear upon the question of fraud in law. The controversy, in the form and forum in which it was brought, and upon the evidence adduced, resolved itself

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into the naked issue, whether or not the directors of the plaintiff were induced to purchase the mine by the fraudulent representations or concealments of the vendors regarding material facts. If the question had been, whether those individuals who became shareholders of the plaintiff, were led to invest their money in the company by fraud, or, if not by fraud, by instrumentalities which the law does not tolerate, a very different case would have been presented. Upon the issue tried, the plaintiff was given the benefit of a ruling which has never been advanced, to my knowledge, in any action at law, but which, however severe it may be upon the vendors, in the situation of these defendants, I have no doubt, is sound in principle, and was just in its application here. The jury were instructed, that, "inasmuch as the defendants were directors of the plaintiff at the time of the sale of the mine, and, for that reason, bound to exercise the utmost good faith in their dealings with their co-directors, a more rigorous rule should be applied, than that which obtains between vendor and vendee ordinarily. If, therefore, in the particulars detailed in the declaration, the defendants withheld from their co-directors any information as to material facts affecting the property, intending thereby that their co-directors should be misled, their conduct was actionable concealment, within the meaning of the law, if it operated to induce the purchase; and, to the extent that the plaintiff has sustained loss thereby, it is entitled to recover." Whether, under this instruction, the finding of the jury for the defendants was based on the theory, that the defendants honestly imparted to their co-directors all the information they possessed relative to the property, which they deemed material to be known, or whether it was based on the theory that the directors relied, not on the good faith of the vendors, but upon their own investigations in reference to the property, is not material. Upon either theory, there was sufficient evidence to authorize the verdict, and, upon either theory, the plaintiff's cause of action failed.

Bennett v. The Maryland Fire Insurance Company.

The motion for a new trial must be denied.

Edwin W. Stoughton, for the plaintiff.

Edward J. Phelps and *Lucius E. Chittenden*, for the defendants.

GEORGE BENNETT AND OTHERS, ADMINISTRATORS OF MORRIS
BENNETT, DECEASED

vs.

THE MARYLAND FIRE INSURANCE COMPANY.

Circumstances stated which amounted to a ratification, by a fire insurance company, by silence, of the act of its agent, in accepting the responsibility of a broker to whom the assured paid the premium, in lieu of the money of the assured.

The policy not requiring the payment of the premium in money, the premium was paid by the acceptance by the agent of the promise of the broker, in lieu of the money, and the company could not cancel the policy without repaying the premium to the assured.

Provisions in a policy of fire insurance for notice of loss and proofs of loss are for the benefit of the insurer, and can be waived.

Notice of loss to the agent of the insurer was, in the absence of knowledge of the revocation of his agency, notice to the insurer.

After knowledge by the insurer of the fact of loss, its repudiation of the policy without objecting to the sufficiency of the notice of loss, was an acquiescence in the sufficiency of such notice.

Repudiation by the insurer of liability for the loss was a waiver of the necessity of furnishing proofs of loss.

An assignment by parol of the right of action on a policy of fire insurance, after a loss, is sufficient to transfer the cause of action.

Where the answer to the complaint, in an action on a policy of fire insurance, only denies the allegations of the complaint, the defendant cannot prove a defence based on a breach of any conditions in the policy other than such as are conditions precedent to the right of the plaintiff to recover.

(Before WALLACE, J., Northern District of New York, March 18th, 1878.)

Bennett v. The Maryland Fire Insurance Company.

WALLACE, J. This is a motion for a new trial by the defendant. None of the objections urged to the recovery are tenable.

First. Hamlin was the agent of the defendant, authorized to make insurance and deliver policies. The assured paid the premium to a broker, and Hamlin, knowing of the payment, accepted the responsibility of the broker, by an agreement with him, in lieu of the money paid by the insured. The assured, subsequently desiring to build an addition, which would increase the risk, applied to Hamlin to endorse a consent. Hamlin informed the assured that he would have to forward the policy to the company, but the consent would be given, and the assured might rely upon it and go on with his addition. The company knew that the policy had been issued, and declined to take the risk, and so notified Hamlin. Notwithstanding this, Hamlin did not inform the assured. Some time after this, Hamlin forwarded the policy to the company, to obtain the consent of its officers to the building of the addition, at the same time informing them of the whole transaction relative to the premium. The company retained the policy, and did not notify Hamlin that consent would not be allowed, or that the policy would be deemed cancelled. It thus appears that the company knew that the policy had not been recalled by Hamlin, and that the assured supposed it to be in force and was acting in reliance upon that assumption. By silence, the defendant ratified the act of its agent in accepting the responsibility of Nichols in lieu of the money of the assured. Slight acts are sufficient to constitute a ratification; and silence, when good faith requires the principal to speak, is sufficient.

Again, the policy did not require payment of the premium in money; and, when the agent of the defendant accepted the promise of Nichols, in lieu of the money of the assured, the premium was paid. The agent became liable to the defendant for the premium, to the same extent as though he had received the money of the assured; and the assured were protected to the same extent as though they had paid their money to Hamlin. If they had paid Hamlin the money, and he had

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failed to remit it to the defendant, the defendant, nevertheless, would have been bound by the policy. It is equally liable now. (*Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun*, 90; *Goit v. Protection Ins. Co.*, 25 *Barb.*, 189; *Church v. Brooklyn Fire Ins. Co.*, 19 *N. Y.*, 305, 311; *Bodine v. Exchange Fire Ins. Co.*, 51 *N. Y.*, 117.) Under these circumstances, the defendant could not cancel the policy without repayment of the premium to the assured. Instead of doing this, the defendant, with full knowledge of all the facts, retained the policy when it came into its possession for another purpose, without expressing any intention of repudiating the transaction.

Second. The policy required the assured, in case of loss, to give notice in writing to the company forthwith, and, as soon after as possible, to serve proofs of loss. As soon as the fire occurred, the assured notified Hamlin, and he wrote to the company. Shortly thereafter, the assured heard that the defendant disclaimed liability, and one of them went to the office of the company, and was informed by its officers that the policy had been cancelled and was not in force at the time of the loss. Then the assured gave written notice of the loss to the company, and served proofs of loss, both of which were shortly after returned by the defendant, upon the ground that the defendant had no policy on the property and nothing to do with the loss. When Hamlin wrote to the company, his act enured to the assured and satisfied the condition requiring written notice forthwith. The proofs of loss were served as soon as practicable under the circumstances, as appears by the testimony. But, both of these conditions were made a part of the policy for the benefit of the defendant, and could be waived by the defendant. The defendant received notice of the loss forthwith, but not notice in writing. Notice by the assured to Hamlin, whom the defendant had held out as its agent, was, in the absence of knowledge on the part of the assured that Hamlin's agency had been revoked, notice to the defendant; and, when, after this had been given, and one of the assured saw personally the officers of the defendant, and they,

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instead of objecting to the formality of the notice, told him that the defendant repudiated the policy, they acquiesced in the sufficiency of the notice.

No objection can be heard to the sufficiency of the service of the proofs of loss. If they had been served immediately after the interview between one of the assured and the officers of the defendant, they would have been in time, clearly. When, in that interview, the defendant repudiated all liability for the loss, the assured were absolved from making proofs of loss. The proofs, however, were forwarded, and were returned by the defendant, as of no interest to it. The defendant waived the condition in this regard. (*Norwich & N. Y. Trans. Co. v. Western Mass. Ins. Co.*, 6 *Blatchf. C. C. R.*, 241, and cases there cited.)

Third. After the fire, the assured transferred, by an oral agreement, his right of action to the plaintiff's intestate; and the other individuals to whom the loss was payable by the policy, as their interests might appear at the time of the loss, assigned their interest to the plaintiff's intestate. The assignment by parol was sufficient to transfer the cause of action. (*Kessel v. Albetis*, 56 *Barb.*, 362.) It operated as an appointment of the assignee as trustee, within section 113 of the Code of Procedure, and authorized him to maintain the action.

Fourth. The defences presented by these various objections urged to the plaintiffs' right to recover, are the only ones of which the defendant can avail itself under the pleadings in this action. The complaint does not set out the policy, but describes it sufficiently to permit it to be put in evidence, and alleges that the assured and the plaintiffs have duly performed all of the conditions of the policy. The issue tendered by the answer is, in substance, a denial of the averments of the complaint. The rights of the parties are to be ascertained, not by the rules of pleading at common law, but by those adopted by the Code.

Under this issue, it was incumbent on the plaintiffs to prove the execution and delivery of the policy, the plaintiffs' interest and title to sue, the loss by fire of the property described,

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the amount of the loss, and notice and proof of loss in due form given to the defendant. The defendant was at liberty to controvert all the facts which it was incumbent on the plaintiff to prove, including the performance of any condition precedent to the plaintiffs' right to recover, (*Code, section 162; New Code, section 533,*) but it could not avail itself of any defence based on a breach of any other conditions in the policy, because no such defence was set up in its answer.

The defendant is, therefore, precluded from relying upon the breach of any condition in the policy, except of such as the plaintiffs were bound to show affirmatively had been complied with, as a condition precedent to their right to recover. No issue is tendered by the answer, to the effect that the policy became void because the risk was increased by the act of the assured; and the same may be said of the other defences not hitherto discussed. While, it is true, evidence appeared on the trial from which breaches of these conditions might be inferred, the plaintiffs were not required to meet that evidence, because not notified by the answer that such issues were to be tried.

Judgment is ordered for the plaintiffs, upon the verdict.

W. L. Dailey and *W. F. Cogswell*, for the plaintiffs.

E. H. Benn, for the defendant.

SAMUEL WELLS

vs.

THE CENTRAL VERMONT RAILROAD COMPANY AND OTHERS. In
EQUITY.

Reasons stated why a motion to dissolve an injunction should be considered and disposed of on its merits, rather than that the injunction should be continued until the hearing, even if its maintenance then should be doubtful.

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The provisions of the Act of the Legislature of Vermont, (*Laws of Vermont*, 1874, *Act No. 1*, p. 16,) providing for the taxation of the property of railroads, are not invalid by reason of the fact that lands improved by having a railroad built on them are not made taxable until they have been so improved ten years.

Whether § 3224 of the Revised Statutes of the United States, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court," applies to a suit in a Federal Court to restrain the collection of a State tax, *quere*.

(Before WHEELER, J., Vermont, March 21st, 1878.)

WHEELER, J. The motion of the defendants for a dissolution of the injunction heretofore granted in this cause, has been heard on bill, answer and argument of counsel. The injunction restrains the collection of municipal taxes assessed, under the law of Vermont providing for the taxation of the property of railroads, upon the property of the Vermont and Canada Railroad Company, in possession of the Central Vermont Railroad Company. (*Laws of Vermont*, 1874, *Act No. 1*, p. 16). Some of these taxes were assessed in 1875, and the time limited by law, within which they may be collected, will soon expire.

It was suggested, in argument, for the orator, that, if the injunction should be dissolved, he would be without remedy, and that, on that account, it should be continued to the hearing, even if its maintenance then should be doubtful. There would be some force to this suggestion, beyond what it now has, if the case was likely to or could stand any differently at the hearing from what it does now; but it is not likely to and cannot stand much differently. The only ground on which it is claimed that the taxes should not be collected is, that the law itself is unconstitutional and invalid. That question arises upon the face of the law, so that there are no issues of fact to be tried by proofs that might be presented differently upon the evidence then from what they can be now; and it is not apparent but that all questions of law involved have been as well presented now as they can ever be. And, besides, it is doubtful whether, if the injunction should be continued so as to prevent

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collection within the time limited, the taxes could be collected afterwards, although, ordinarily, a statute of limitation will not run upon an act restrained by injunction. For, in respect to taxes, the rate-bill and warrant are in the nature of an execution, differing, however, in so far that they cannot be renewed, and that they do not issue from, and are not returnable to, any Court, where any answer to the fact that the time within which they were operative had elapsed could be shown. The question involved does not seem to be very intricate or difficult, and, in view of all these various considerations, it seems most just that it be disposed of on its merits, according to the usual course with such motions.

In behalf of the orator, it is not claimed but that the real estate of railroads is taxable, nor but that it is taxable in the mode by which that of the railroad reached is taxed by the law in question; but it is claimed that, on the face of the law, all are not taxed, and that the Legislature has not the power thus to discriminate. If this claim was well founded, it is not easy to see how any of the laws of the State by which taxes are laid are valid. For, the only foundation of the claim is, that the taxes of the orator and his associates are made greater than they should be, by leaving others who should pay to go clear of paying any; and the same is true as to all other tax-payers as well as to them. That the property on which none are paid is of the same kind as that upon which the taxes complained of are assessed, can make no difference. If these tax-payers have the right to say that they will not pay their taxes because all other owners of the same kind of property are not required to pay like taxes, then all other tax-payers would have the same right, and all lawful taxation would fail, until the system should be made so perfect as to reach all property and all persons in the same proportion—a result not soon to be even hoped for. By the Constitution of the State, the mode of laying taxes is left wholly to the Legislature. It is merely said, (*Constitution of 1793, Chapter 1, Article 9*), that “every member of society hath a right to be protected in the enjoyment of life, liberty and property, and, therefore, is

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bound to contribute his proportion towards the expense of that protection ;” and that, “previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the legislature to be of more service to the community than the money would be if not collected.” Under the Constitution, exemptions similar to that complained of in this law have always been in force. Up to the year 1820 none but improved lands for pasturage, tillage, or mowing, or which were stocked with grass and within enclosure, were taxed, leaving all unimproved and unenclosed lands without taxation ; and not only this, but improved lands were not taxed until they had been improved two years. This exemption was very much like that complained of. By the law in question, lands improved by having a railroad built on them are taxed, but not until they have been so improved ten years. The improvement is greater, and the exemption longer but far less extensive, than those mentioned. So, persons have always been exempt from poll taxes until they arrive at a certain age, and almost always after they have passed certain ages. And, while horses, cattle, sheep and swine have been always taxed, the young of each, up to certain ages, have been left without being taxed. And the legislature has frequently, in its discretion, for the sake of encouragement to laudable enterprise, made particular exemptions, important in character, when considered in connection with the tax-paying property left—like the exemption of the whole township of Wheelock from all public taxes, (*Morgan v. Cree*, 46 *Vt.*, 773 ;) the exemption of the Vermont Central Railroad from taxation, (*Vt. C. R. R. Co. v. Burlington*, 28 *Vt.*, 193 ;) the exemption of certain persons, (*Wheeler v. Lane*, 15 *Vt.* 26 ;) and many others of like character. The right to make these exemptions has stood unchallenged until the present case, and the want of it is not consistent with the idea of the sovereignty that belongs to a State. So firmly settled is the power of the legislature of a State to make exemptions from taxation, that, when a franchise is granted by a legislature, free from taxation, it is not within the power of it to afterwards withdraw the exemption

by repealing the law that created it, or by any other legislation. (*Gordon v. Appeal Tax Court*, 3 How., 133; *State Bank of Ohio v. Knoop*, 16 How., 369; *Vt. C. R. R. Co. v. Burlington*, 28 Vt., 193.) The power to make such exemptions, unless restrained by constitutional provisions, must rest with the legislature of every State, to be exercised in its own discretion. As is said in the opinion of the Court, in *State Bank of Ohio v. Knoop*, by McLean, Justice: "The taxing power may select its objects of taxation." "Now, the exemption of property from taxation is a question of policy, and not of power."

Then, further, strictly speaking, this is not an absolute exemption of any property, if, in fact, it can be said to be any exemption. In the form of the enactment it is styled an exemption of the real estate of railroads until ten years from the time when traffic commences throughout their lines; but the form does not affect the substance. In effect, the legislature, in selecting objects of taxation, took railroads having ten years of growth, and of that class it exempted none. But, if the effect be stated, that they took railroads and exempted new ones during the first ten years of their existence, then it is only a qualified exemption, that will pass away with the prescribed time, as to all of them. And, still further, whatever it is called, it does not operate to create any discrimination in favor of or against any railroads, old or new. All those that had been in full operation ten years, and so were taxable under the law when it was passed, had realized their exemption of at least ten years in extent already, and those that had not could not by the law be taxed till they had, so that, altogether, the exemption, if not uniform, has existed so as to make a discrimination in favor of instead of against the one of which the orator is a stockholder, and those of its time.

From whatever point of view the subject is looked at, it seems clear, that no constitutional right of the orator has been infringed upon by this legislation and the proceedings under it.

There is another ground urged by the defendants why this

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injunction should not be maintained, and that is, as it is claimed, because such a proceeding is prohibited by the laws of the United States. The Revised Statutes of the United States, (*sec.* 3224,) provide, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court." Taken literally, this would prohibit such a proceeding as the one under consideration from being had in any of the State Courts as well as in the Federal Courts. But, Congress has no control over State Courts, in respect to State taxes, and it is not to be presumed that it intended to reach beyond where its power extended, but to the contrary, and, therefore, that broad construction cannot prevail. It has exclusive control over the Federal Courts and Federal taxation, and no one does or could claim but that this statute would apply to those Courts, in respect to that subject. It also has exclusive control over the Federal Courts in respect to all other subjects, including proceedings concerning State taxation, when involved in those Courts, and there is no very plain reason why this statute should not be held to apply to them, in respect to that subject, also. The reasons for not interfering in this way with State taxation are equally strong with those for not interfering with Federal taxation, if not stronger. Congress has been careful to provide that the Federal Courts shall not interfere by injunction with proceedings in State Courts. (*Rev. Stat. U. S., sec.* 720.) This statute in respect to interfering with taxation is legislation in the same direction, and it would seem reasonable, when Congress had full power to restrain interference by the Federal Courts with State taxation, and used language broad enough to fully cover that restraint, and that construction is in accordance with the spirit and tendency of prior legislation, to presume that the intention was to accomplish that object. If this statute had been placed among those defining the powers of the Federal Courts, there would not be much, if any, doubt but that it was intended for a restriction upon those Courts in all cases. But it is placed among the statutes relating to Federal taxation, and that affords some ground for the argument that it was only

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intended to apply to such. As the scope of this statute is somewhat doubtful, and the propriety of restraining the collection of the tax by continuing the injunction has been fully argued on the general ground, it has been thought better to examine into those grounds rather than turn the question upon the construction of the statute merely. On those grounds it appears to be clear that the injunction should be dissolved.

If ultimately it should turn out that the taxes are wholly illegal, the corporation of which the orator is a member can recover them back. And, if that corporation refuses to do so, and thus to protect his rights, and he has any legal and equitable right to his share, it seems quite probable that he can have his share decreed to him.

The injunction is dissolved.

Benjamin F. Fifield, for the orator.

Alfred G. Safford, for the defendants.

J. C. FRESE & Co. vs. EDWARD BACHOF. IN EQUITY.

Where a bill was brought in the name and right of a firm, by a person claiming to be its sole member, to enforce its right to a method of identifying its wares, and it appeared that the right belonged to the firm, and that there was another member of it, who was not a party plaintiff, and the case was a meritorious one, opportunity was allowed to bring in such other member. The plaintiffs' firm had long been accustomed to pack a compound called "Hamburg tea," in long cylindrical packages with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm name printed across a white label within a circle pasted across the ends of the string, and the same embossed with the words "Hamburg, Hopfensack, 6," on another white label pasted on the package, so that the package, by its form and colors, would be at once known by its general appearance, without taking time to read anything on it; and their wares had come to be well known as theirs by the appearance of the packages. B. openly used such style of package and firm name to put up Hamburg tea.

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He then discontinued the use of the firm name, but continued to use the exact form and style of package, substituting his own name merely for that of the firm on the labels: *Held*, that, with the proper parties before the Court, B. ought to be restrained by injunction from such use of the plaintiffs' symbols.

(Before WHEELER, J., Southern District of New York, March 22d, 1878.)

WHEELER, J. This cause has been heard on bill, answer, replication, proofs and argument. The bill is brought by Christel F. H. Frese alone, claiming to stand upon rights acquired by a firm to methods of identifying their wares, of which he alleges himself to be now the sole member. The defendant does not admit any right to the orator, but leaves him to his proof. The proof shows Edward George Schroeder to be a member of the firm equally with the orator, and, whatever right it does show in respect to the matter of the bill, it shows to belong to the firm. As the case stands, the orator has no right to be protected in this form, and, if it should proceed to a decree, the bill would have to be dismissed. But, the bill is brought in the firm name and right, and has been litigated in that right, and the want of the other member is a defect that can be cured by amendment. (*Lewis v. Locke*, 41 Vt., 11.) Under such circumstances, where a case appears to be meritorious, it is not usual to proceed to a decree without affording an opportunity to amend upon some terms. (*Story's Eq. Pl.*, § 236.) This consideration makes it necessary to inquire into the merits of this case.

The orator's firm have not any patent on the compound called "Hamburg tea." The manufacture and sale of that article are open to all persons. Nor is it in the bill directly alleged, nor does the bill appear to proceed on the ground, that this name was appropriated and used by them to identify their production. So, for aught that appears, all persons are at liberty to apply that name to their own manufactures. The proof shows clearly that the name of the orator's firm has long been used in this business, and that the wares of the firm, of this sort, came to be known by it. It also shows, that this firm is a successor of the former one. Whether it is or not

is a question of fact, and this fact could be and has been established by parol proof. The trade-marks of the firm were partnership property, and would pass to the successors. (*Coll. on Part.*, 6th ed., § 117, note.) The defendant does not claim the right to use the firm name of the orator's firm, nor their registered trade-mark, and there is no question made about those. But the orator claims that his firm and their predecessors have long been accustomed to pack this article in long cylindrical packages, with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm name printed across a white label within a circle pasted across the ends of the string, and the same embossed with the words "Hamburg, Hopfensack, 6," on another white label pasted on the package, so that the package, by its form and colors, would be at once known by its general appearance, without taking time to read anything on it; and that their wares have come to be well known as theirs by the appearance of the packages. They have the exclusive right to sell their wares as their own, and no other person has any right, by any means, to palm off any other wares than theirs as theirs. And, if any person does utter any other wares than theirs as theirs, an action at law would lie. And, whenever there is danger that this would be done so often as to occasion multiplicity of suits, or so as to work irreparable injury, a Court of equity would interfere by injunction. The orator's proof shows that the firm has long used this style of package. It also appears, that the defendant at first openly used the style of package and firm name; that, in obedience to warning, he discontinued the use of the name on the outside of the package; and that, under the pressure of legal proceedings, he has stopped the use of that altogether, and that of the words "Hopfensack, 6," but that he still continues the exact form and style of package, substituting his own name merely for that of the firm, on the labels. The exact question is, whether this is a simulation of his wares for those of the orator's firm, calculated to have them pass for the orator's firm's wares.

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Probably, no mere form of a package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any particular make. But, when the form of these packages, the color of the wrappers and papers done up with them, and the form and color of the labels, are considered all together, it is quite apparent, that, when they had been so long used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation, that they contained that article, of that manufacture. It is equally obvious, that the very slight changes made by the defendant in the general appearance of his packages used by him now, would not put the general public purchasing such articles on their guard ; and that the use of such packages for a similar article would amount to a forcible representation, that it was the same article that the orator's firm had been accustomed to pack in that way. And, when the mode in which the defendant commenced using such packages, and the various steps by which he has been brought to his present method, are considered, there does not seem to be any fair question, but that his use of them now is for the purpose of passing off his wares for those of the orator's firm. Upon this view of the case, it seems, that, with the proper parties before the Court, the defendant should be restrained by injunction from making the use he does of these symbols.

Let the cause stand, with leave to the orator to move for an amendment, if he shall see cause, within thirty days; otherwise, let a decree be entered, dismissing the bill of complaint, with costs, but without prejudice.

Arthur V. Briesen, for the orator,

Edwin M. Wight, for the defendant.

J. HOYT BOSTWICK *vs.* ADDI M. FOSTER. IN EQUITY.

L. executed a mortgage to A., his brother, in Vermont, to secure a pre-existing debt, more than two months before a petition in bankruptcy was filed against L. The mortgage was not recorded until within two months before such petition was filed: *Held*, that the mortgage was not fully *made*, under the laws of Vermont, as against the assignee in bankruptcy of L., until it was recorded.

(Before WHEELER, J., Vermont, April 19th, 1878.)

WHEELER, J. This is a bill in equity brought by the orator, as assignee in bankruptcy of the estate of Lemuel P. Foster, to set aside a mortgage executed by the bankrupt to the defendant, his brother, on the 6th day of July, 1876, and recorded on the 1st day of August, 1876, made to secure pre-existing debts. The petition in bankruptcy was involuntary, and was filed September 8th, 1876, more than two months after the making, but within two months of the recording, of the mortgage. No question is made but that the bankrupt was insolvent at the time of making the mortgage and continued to be so afterwards. The proof shows there were other debts of which the defendant knew, and that he must have known, if he considered the facts before him, that the mortgage was made to give him a preference over other creditors, and, so, that it was made in fraud of the provisions of the bankrupt law, intended for the equal distribution of the property of bankrupts among their creditors, and that he had reasonable cause to believe that the bankrupt was insolvent. Upon these facts, if this mortgage was *made* within two months of the filing of the petition in bankruptcy, within the meaning of the bankrupt law, under the laws of the State, it is void and should be set aside; if not, it is valid, and should be upheld.

Under the laws of the State the mortgage was not "good and effectual in law to hold such lands against any other person but the grantor and his heirs only," without being recorded. (*Gen. Stats.*, p. 448, § 7.) Under this statute, the mortgage could not be made effectual against any one but the bankrupt and his heirs, without including recording it, as a

representative of the bankrupt, and has only his rights, the instrument is as effectual against him as against the bankrupt, without recording. But, under the bankrupt law, the assignee, in some senses, represents the creditors as well as the bankrupt, and has some rights, under some circumstances, in their favor, that the bankrupt himself could not have. The assignment by the judge or register to the assignee conveys not only "all the estate, real and personal, of the bankrupt," subject to the exemptions, but, "all property conveyed by the bankrupt in fraud of his creditors" is at once vested in the assignee. (*Rev. Stats. U. S.*, sec's 5044, 5046.) Under the laws of the State, the bankrupt did not represent his creditors, so that the mortgage, because it was valid against him, would be against them, without registration. (*Hart v. Farmers' Bank*, 33 Vt., 252.)

If a conveyance by a debtor, upon a new and valuable consideration, might be good against a mere creditor advancing no new consideration, without the registry or any notice of the conveyance, on account of the superior equity of the purchaser, as might appear from the remarks of the learned Chief Justice, in the case mentioned, that could not avail the defendant here, for he advanced no new consideration whatever, and, according to his own testimony, did not even seek the security, and can have no superior equity to stand upon.

So, under the law of the State, registration of the mortgage was necessary to make it operative for the purpose here sought for it by the defendant. Under the bankrupt law, it was not fraudulent as to creditors, so it would always be void against them. But, by the express provisions of the Act, it would become so upon the institution of bankruptcy proceedings within two months from the time it was made, and the property, as against the assignee, would be vested in him.

In this view, this mortgage was not fully *made*, as against the assignee, until it was recorded, and, as that was within two months of the filing the petition, it was void, or became so when the petition was filed, as against him.

In *Exchange Bank v. Harris*, (4 *Dillon*, 133,) it was substantial part of the making. If the assignee is a mere rep-

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found, that an intended security was kept from the registry by agreement, from before till within the prescribed time, and that, under those circumstances, it was not made until registration. In this case, it does not appear that there was any express agreement that the mortgage should not be left for record, but, whether there was or not, it was kept from the record by the failure of the defendant, through the intentional or unintentional neglect of the bankrupt, to whom he intrusted it, to leave it for record, and it was the fault of no one else, and the effect upon the creditors, as to notice of the mortgage, was the same as if it had been purposely done by express agreement. The lack of notice, which the registry would have given, was the result of his own neglect, or that of his brother acting for him, and the consequences should fall upon him, the same as if he had designedly connived at the lack.

Let a decree be entered that the mortgage be set aside as to the orator, as assignee, and that the defendant be restrained from setting up any claim against the orator, as assignee, under it, with costs to the orator.

Fifield, Pitkin & Porter, for the orator.

Wilder L. Burnap, for the defendant.

THE AMERICAN MANUFACTURING COMPANY

vs.

STEPHEN LANE, JR., AND WILLIAM D. CHASE. IN EQUITY.

The invention set forth in letters patent granted to A. Stewart Black, July 14th, 1863, for an "improvement in tempering umbrella ribs," defined.

The first claim of said patent, namely, "Constructing the tempering die with a square hole, corresponding in size to the wire to be tempered, in order that the wire may be straightened in all directions, and the flattened portions of

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the wire be brought in line with each other, as and for the purposes specified," is infringed by the use, for the tempering of umbrella ribs of U-shaped wire, with wider flattened parts in them, of a die formed of two plates, one above and one below, with the groove in one plate shallow and semi-elliptical, to accommodate one edge of the flattened parts of the rib, and with the groove in the other plate broader and deeper, and, in its cross-section, the shape of the body of the wire, with a channel opposite to and like the groove in the other plate, to accommodate the other edge of the flattened part of the rib. The prior existence of a square hole or groove for the purpose of drawing through it square bars or strips of metal, to compress them and straighten them, does not anticipate the invention claimed in said first claim.

(Before BLATCHFORD, J., Southern District of New York, April 27th, 1878.)

BLATCHFORD, J. This is an application for a provisional injunction to restrain the alleged infringement of letters patent granted to A. Stewart Black, July 14th, 1863. The specification of the patent sets forth that Black has "invented, made and applied to use a certain new and useful improvement in tempering umbrella ribs and similar articles." The specification says: "In tempering ribs for umbrellas and parasols and similar articles, great difficulty is experienced in obtaining a uniform temperature throughout the entire length, so as to temper all parts equally. Some parts are tempered too much and bend in use, and others are not tempered enough and break. Besides this, the hardening operation renders the wire composing such ribs more or less crooked, and they have to be straightened at the time of tempering, while in a heated state. Various attempts have been made to effect these operations, however, with but partial success. The nature of my said invention consists in a peculiar construction of grooved or perforated metallic tempering die, that is heated to a sufficient extent to temper the umbrella rib or similar steel article, and the groove or opening in said die, being straight and of the size required for containing such article, straightens it at the same time that its temper is drawn to the degree required. I make use of gas flames or jets to heat the said tempering die, whereby greater uniformity can be obtained in the same than by a fire heat, and said heat can be kept uniform, hour after hour, without especial attention, thus rendering my

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apparatus adapted to tempering in the most uniform and delicate manner, even when attended by boys, or comparatively unskilful workmen; whereas, the tempering of such articles has heretofore required the exercise of great judgment by skilful workmen." There are three figures of drawings referred to. Figure 1 "is a vertical section of the tempering apparatus, at the line xx , of Figure 2." Figure 2 "is a plan of said apparatus, partially in section, to show the interior." The specification proceeds: "In the drawing, a is a metallic bar, of the requisite size and length, with grooves planed or otherwise formed in the upper surface, as seen in the section, Figure 1, and these grooves are to be of the size required for admitting the wire forming the umbrella spoke or other article; and I prefer, for such ribs, that the grooves be formed with square corners, to allow the flattened parts of the ribs to pass, as illustrated in larger size in Figure 3, said flattened parts being made for the reception of the holes required at the ends and near the middle of such ribs, and, when placed in the said grooves, these flattened portions are diagonal and are brought properly into line with each other by the groove itself. The grooved bar a is to be covered with a second bar b , setting closely to the bar a , so as to form a perforated tempering die. It will be seen that this form of construction is preferable to any other in which the hole might be bored or formed partly in each bar, as this construction is the cheapest and most accurately made, although I do not confine myself in this particular. Where desired, the upper bar b may also be grooved with the same or a different sized groove or channel, setting intermediate to those in the bar a ; and the parts a and b may be held together by screws or otherwise. The perforated metallic tempering die made as aforesaid, and heated by competent means, will temper wire umbrella ribs, or similar articles passed through it, and hold the same in a straight position while being tempered, the wire or ribs being passed in at one end and forcing out the tempered rib at the other end." The specification then describes an apparatus for heating the dies, by means of gas-burners, and says, that, "by this device,

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the temperature of the dies is rendered uniform and continuous, and can be regulated with the greatest exactness, by the flow of gas admitted." There are three claims, as follows: (1.) "Constructing the tempering die with a square hole, corresponding in size to the wire to be tempered, in order that the wire may be straightened in all directions, and the flattened portions of the wire be brought in line with each other, as and for the purposes specified;" (2.) "Constructing the tempering die with the grooves in one of the half-pieces coming opposite the flat surface of the other half-piece, whereby the tempering dies are more easily made and kept in order, as set forth;" (3.) "The tempering dies constructed substantially as specified, and enclosed in a suitable casing, in combination with gas-burners applied substantially as shown, whereby the temperature of the said tempering dies is easily regulated and maintained with uniformity, as set forth."

The defendants have made umbrella frames called "paragon" frames, the ribs in which are constructed of U-shaped wire. Such wire cannot be tempered and straightened in a die with a square hole, if there are wider flattened parts in the wire. The die with a square hole can be used to temper and straighten only round wire, if there are wider flattened parts in the wire. The wire referred to in the specification of the plaintiff's patent is round wire. The "paragon" ribs tempered and straightened by the defendants have wider flattened parts in them, and have been tempered and straightened by them in heated dies. The dies are formed of two plates, one above and one below. The groove in one plate is shallow and semi-elliptical, and the groove in the other plate is broader and deeper. The former groove accommodates one edge of the flattened parts of the rib, while the latter is, in its cross-section, the shape of the body of the wire, with a channel opposite to and like the groove in the other plate, to accommodate the other edge of the flattened parts of the rib. In the square-holed die, the wider flattened parts of the round wire are accommodated in the diagonal corners of the square hole, while the surface of the round wire touches the four sides of the

square hole. In the defendants' die, the contour of the body of the wire touches the surface of the body of the groove at all points, while the wider flattened parts of the wire pass through the two narrow grooves.

In each of the two constructions of dies the result is attained of tempering and straightening the rib at the same time, and of doing this after the wider flattened parts have been formed in the rib. In each the groove is straight longitudinally, and is of the shape and size requisite not only to contain the rib, but to embrace and support it at such points as will serve to straighten it in its passage, and to admit at the same time of the free passage of the wider flattened parts through portions of the groove, which are so arranged as to keep such wider flattened parts of the rib in line with each other. In each the dies, when heated, will temper the rib, and hold all parts of it in a straight position while being tempered, and the tempering and straightening take place while the rib is moving through the groove longitudinally from end to end. The mode of operation of the two dies, in their use in connection with the wire which is passed through them, is the same. The defendants' tempering die is constructed with a hole which corresponds in size to the wire which is to be tempered, and, in tempering the wire, by drawing it through such hole when the die is heated, the wire is straightened in all directions, and the flattened portions of the wire are brought in line with each other. The language of the first claim of the plaintiff's patent describes the defendants' die and its effect on the wire that is drawn through it, except that such claim describes the hole in the die as square. The hole in the defendants' die is not mathematically square. But, the whole tenor of the specification shows that the meaning of the claim is, that the hole or groove shall be of such size and shape as to allow the body of the wire to go through and be straightened while it is being tempered, and also to allow the flattened parts of the wire to go through and be kept in line with themselves and with the body of the wire. For a round wire a square hole will accomplish all of these results. The corners of

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the square are merely supplementary spaces for the passage of the wider parts. The shape of the exterior walls of such spaces is manifestly immaterial, so long as the spaces exist and have exterior walls. In the patent the spaces are described as corners of a square. But, whether the two lines of the corner form a right angle with each other, or a greater angle than a right angle, or form together any other figure, is manifestly shown by the specification to be immaterial, so long as the walls of the groove hug the body of the wire and yet leave space for the wider flattened parts. The corners of the hole in the defendants' die, though not mathematically square, are, to all practical intents, square, so far as the supplementary spaces are concerned. The invention embodied in the first claim of the patent is found, in all particulars, in the defendants' dies. The first claim of the patent is not limited to a groove which is wholly in one of the two half-pieces of the die. That feature exists in the second claim; but the specification states that a groove formed partly in each of the two half-pieces is contemplated by the inventor.

The specification is not artistically drawn. It seems to set out with describing the invention as being to draw the rib through a straight heated groove of the proper size in a metallic die, and it follows out that idea. It states the leaving of a space for the flattened parts of the rib to pass through, as a preferential construction. It would seem as if the intention originally was to claim broadly the tempering and straightening of the rib in a heated metallic die having a straight groove in it of the size and shape of the rib. But there is no such claim. The first claim is narrowed to a construction which includes only a rib with flattened parts, and a groove which will accommodate such flattened parts, which are shown in Figure 3 of the drawing as projecting beyond the line of the body of the unflattened parts of the rib. The first claim does not include a rib which has no flattened parts, nor does it include a groove which will accommodate only a rib which has no flattened parts. It is contended by the defendants that the first claim claims merely a die with a square hole, as a struc-

ture, and that, if a square hole in a metallic die is shown to have existed before, the first claim is void for want of novelty. But, the fair construction of the first claim, in connection with the body of the specification, is a claim to the mode or process of tempering and straightening a rib which has a body, and flattened portions other than such body, by drawing the rib through a straight hole or groove in a heated metallic die, of the proper size and shape to at once embrace closely the body of the rib, and yet, by supplemental spaces in the groove, to allow such flattened portions to pass through freely and be brought in line with each other. The whole text of the specification shows that the invention is declared to be one of an improvement in tempering the rib, that is, in the process or mode of tempering it, and the description is declared to be a description of such improvement. The square hole or groove may have existed before and been used for the purpose of drawing through it square bars or strips of metal, to compress them and straighten them, but, such prior existence and use of the square groove does not anticipate the invention claimed in the first claim of the Black patent, as such invention is above defined. In such aspect, the use of the square groove in the manner and for the purpose indicated in such first claim is not the mere use of an old thing for a new purpose, or the mere application of the square groove to a new use.

The defendants adduce various prior inventions, but none of them anticipate the invention covered by the first claim of the patent. The Holland patent has semicircular grooves for straightening and tempering umbrella ribs, but makes no suggestion as to ribs with wider flattened parts. The Fox patent is for tempering and straightening cylindrical wire in circular grooves. The same is true of the Chesterman patent and the Maddin patent. The Hadfield and Shipman patent shows square holes and round holes through which to draw metallic strips, to temper them, but nothing is disclosed that suggests anything more than that round wire is to be drawn through a round groove and square wire or steel through a square groove. So far as appears, Black was the first person to perform the

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process described in the first claim of the patent by the means therein described, and thus the first to temper and straighten an umbrella rib having the wider flattened parts in it.

I do not see that there is any infringement of the second and third claims. Let an injunction issue as to the first claim.

Everett P. Wheeler, for the plaintiff.

John D. Shedlock, for the defendants.

WILLIAM K. CLARE vs. THE NATIONAL CITY BANK.

Items of costs which would have been taxable in favor of a party in a State Court, on a judgment for him, are not taxable in his favor, on a judgment for him in this Court, after the removal of the cause into this Court, unless such items are taxable under §§ 823 and 824 of the Revised Statutes.

(Before CHOATE, J., Southern District of New York, May. 2d, 1878.)

CHOATE, J. This is an appeal from the clerk's taxation of costs. The suit is an action at law originally brought in a State Court. After three trials in the State Court, in two of which the plaintiff had a verdict, which, upon appeal, was set aside, and the judgment reversed, with costs to the defendant, to abide the event, the cause was removed into this Court by the plaintiff, and the defendant now has a verdict and a judgment. The clerk, in taxing the costs, has disallowed the fees taxable by the New York Code, to the defendant's attorney, as fees for proceedings before and after the granting of a new trial, term fees, trial fees, argument fees, fees for making and serving a case, &c., which, if the case had proceeded to the same result in the State Court, would have been taxable against the plaintiff, for the proceedings prior to the removal

of the cause, amounting, in all, to \$435. From the disallowance of these items the defendant appeals.

The clerk is right in his taxation. In this Court, the amount of costs to be allowed to attorneys is governed by §§ 823 and 824 of the Revised Statutes, which do not give to the attorney any of the fees now in question. In general, there is no vested right to costs till judgment, and they are only recoverable as taxable by the law in force at the time of taxation. The Acts authorizing the removal of causes to this Court provide that the cause removed shall proceed in the same manner as if originally commenced here, and there is nothing in those Acts which lends support to the defendant's claim for these costs.

James S. Stearns, for the plaintiff.

William H. Arnoux, for the defendant.

THE BRAZOS.

In a suit founded on an alleged breach of a contract of towage, negligence or unskilfulness in the tug must be shown; and the tug is not negligent, if she exercises that degree of caution and skill which prudent navigators usually employ in similar services.

Where the master of a tug intended to reach a bar at high water, with his tow, and would, if he had done so, have found sufficient water there to take his tow across the bar safely, but miscalculated, and reached the bar after high water, and his tow grounded and was damaged: *Held*, that such miscalculation was negligence, for which the tug was responsible.

(Before BLATCHFORD, J., Connecticut, May 15th, 1878.)

BLATCHFORD, J. It is contended, on the part of the appellants, that the evidence taken on their part, since the trial in the District Court, shows that the captain of the tug could not safely have left one or two of the boats outside of the bar

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while he crossed, as he could not have returned in time to have taken them over on the ebb tide then running; that, as the *Grace Williams* drew the most water, it would have been necessary to take her over first; and that either one or both of the other two, if left outside over that tide, would, probably, have been lost. It is argued, for the appellants, that the decision of the District Court was placed solely on the ground that the tug ought not to have taken the three boats across, all abreast, at the same time, and that that objection is removed by the new testimony.

It is, undoubtedly, true, that, in a case of this kind, the alleged breach of a contract of towage, the libellant must show negligence or unskilfulness in the tug; and that the tug is not negligent, if she exercises that degree of caution and skill which prudent navigators usually employ in similar services. Under this rule, it is contended, for the appellants, that there is no evidence, in this case, of negligence or unskilfulness on the part of the tug; that the captain, when he reached the bar, was of opinion, from his observation, that there was water enough for the tug and the three boats to pass over it safely abreast; and that the disaster occurred because the *Williams* grounded on the extreme left, and because that caused the stern lines from the tug to the *Monmouth* to break. The utmost that the expert testimony on the part of the appellants shows is, that, the tug having reached the bar with the boats, it was the best judgment to try and take them all across, and not to take them across singly, and not to leave any one outside, but to take them across in the manner in which they were taken. But, the difficulty was back of this. The wreck which narrowed the channel had been there some days. It is not shown that its presence was unknown or unexpected to the captain of the tug, or that he expected, on leaving New Haven, to find a wider channel than he did find. Nor is it shown that he expected to find a greater depth of water at the place and at the stage of the tide at which he attempted to cross, than he did find, or that anything presented itself to him, as to ob-

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struction, or width of channel, or depth of water, which he did not previously know or was not bound to know. Under these circumstances, he proceeded to take across the bar a tow 79 feet wide, one of the vessels in which, the Williams, drew about 9 feet of water. He testifies, as his calculation, that there were $9\frac{1}{2}$ feet of water, at the time he made the attempt, for a width of from 150 to 200 feet. If this were so, it was clearly negligence for him to go so far to the left, out of the $9\frac{1}{2}$ feet depth of water, as to ground the Williams, and cause the ensuing disaster. For, on this evidence, there was width enough and depth enough for the whole to have gone safely through, if he had not deviated too far to the left. There is no pretence that this deviation was not the act of his will, in navigating the tug and tows. But, if he is mistaken, and if there was not, at the time, water enough to have floated the Williams over, without grounding, it was negligence to make the attempt, as he was bound to know how much water the Williams drew, and what depth of water there was at the stage of tide then existing. He testifies that it would not have been expedient to lie outside and wait for higher water. Before he left New Haven, he knew this, and knew, also, that he must reach the bar in time to cross it before the ebb tide had lowered the water so far that the Williams would strike. He testifies, that he noticed, while in the Sound, proceeding eastward, that the tide was running ebb; that he discovered that when 4 miles to the west of the mouth of the river; that he began making observations as to the state of the tide, by marks on the shore, when two miles west of the light; that he was towing at the rate of 4 miles an hour; that he remembers that he calculated that it would be high water that day; that he never starts from New Haven for Saybrook, with a tow, without knowing when it is high tide at Saybrook; and that he knew that a bar would form off the stern of the wreck. It is apparent, from this testimony, that the captain of the tug intended to reach the bar at high water, and calculated, before leaving New Haven, that he would do so, and timed his starting from New Haven with

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a view to secure that result. If he had done so, as it is shown there would have been, at high water, ten feet depth of water on the bar, for a space of from 150 to 200 feet in width, west of the wreck, it is plain that the Williams would not have grounded where she did ground, and that the whole flotilla would have crossed in safety. By his own confession, he miscalculated. Such miscalculation was negligence. The disaster was not an "inevitable accident," as is set up in the answer.

There must be a decree for the libellant, in affirmance of the decree of the District Court, with costs.

Charles R. Ingersoll and *Franklin A. Wilcox*, for the libellant.

Charles E. Perkins, for the claimants.

BENJAMIN LOW vs. THE WAYNE COUNTY SAVINGS BANK.

Under § 2 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) a civil suit brought in a State Court, where the matter in dispute exceeds, exclusive of costs, \$500, and in which there is a controversy between citizens of different States, may be removed into the Circuit Court of the United States, even though the case is not one arising under the Constitution, laws or treaties of the United States.

(Before BLATCHFORD, J., Southern District of New York, May 18th, 1878.)

BLATCHFORD, J. This suit was removed into this Court under the provisions of section 2 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) That section provides, that "any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of

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the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper District." When this suit was brought in the State Court, the plaintiff was a citizen of the State of New York, and the defendant was a corporation created by the State of Pennsylvania. The defendant removed the suit into this Court. The alleged ground of removal was, that there was in the suit a controversy between citizens of different States, and that the matter in dispute exceeded, exclusive of costs, the sum or value of \$500. The suit was brought to recover \$600, for professional services rendered to the defendant by the plaintiff, as an attorney and counsellor at law. The plaintiff now moves to remand the cause to the State Court.

It is contended, for the plaintiff, that the statute specifies, first, the kind of causes which are removable, namely, causes involving more than \$500, when said causes are also causes arising under the Constitution or laws or treaties of the United States; and, second, the persons who may remove the suit. It is also contended, that, even where the matter in dispute exceeds \$500, and there is a controversy in the suit between citizens of different States, the suit is not removable, unless, also, the suit arises under the Constitution, laws or treaties of the United States. This is not a sound proposition. The proper construction of the statute, is, that, to be removable, the suit must, in all cases, be a suit of a civil nature, and the matter in dispute must exceed, exclusive of costs, the sum or value of \$500; and that, in addition, the suit must either be one arising under the Constitution, or laws or treaties of the United States, or else must be one in which the United States are the plaintiff or the petitioner, or else must be one in which there is a controversy between citizens of different States, or else

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must be one in which there is a controversy between citizens of the same State claiming lands under grants of different States, or else must be one in which there is a controversy between citizens of a State and foreign States, citizens or subjects. Under that construction, this case was properly removed.

There is nothing in the decision in the case of *Gold Washing and Water Co. v. Keyes*, (6 Otto, 199,) which sanctions the ground taken on the part of the plaintiff. The ground of removal in that case was not diversity of citizenship, but was that the suit arose under certain specified Acts of Congress, and the decision was that, in such a case, it must appear by the record that the suit arose, in part, at least, out of a controversy between the parties in regard to the construction or effect of the statutes, on the facts involved.

The motion to remand is denied.

Benjamin Low, in person, for the motion.

Frank & Weiss, opposed.

SAMUEL A. SAWYER, DAVID L. WALLACE AND THOMAS MILLER

vs.

THE SWITZERLAND MARINE INSURANCE COMPANY.

Where the defendant removed a suit into this Court, under § 2 of the Act of March 3d, 1875, (18 U. S. Stat. at Large, 470,) on the ground that the defendant was a Swiss corporation, and that the plaintiffs, three in number, were citizens of the State of New York, and it appeared that two of the plaintiffs were, when the suit was commenced, aliens and British subjects, and the third was a citizen of New York, the cause was, on the applications of the plaintiffs, remanded to the State Court, on the ground that the requisite jurisdictional citizenship must exist as to each individual plaintiff.

(Before BLATCHFORD, J., Southern District of New York, May 18th, 1878.)

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BLATCHFORD, J. The plaintiffs, as copartners, brought this suit against the defendants, a corporation created by the Republic of Switzerland, in the Supreme Court of New York, on a policy of insurance issued to the plaintiffs as copartners, by their copartnership name. The defendants instituted proceedings, under the 2d section of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) to remove the suit into this Court, on a petition alleging that, when the suit was brought, the plaintiffs were citizens of the State of New York. An order of removal was made by the State Court, and, a copy of the record having been entered in this Court, the plaintiffs now move to remand the suit to the State Court, on the ground that, when the suit was commenced, Wallace and Miller were aliens, and subjects of Great Britain, while Sawyer was a citizen of the State of New York. The statute provides, that, when the suit is a suit in which there is "a controversy between citizens of a State and foreign States, citizens or subjects," either party may remove the suit into the proper Circuit Court. I think that the views laid down in the various decisions of the Supreme Court, from *Strawbridge v. Curtis*, (3 *Cranch*, 287,) to the case of *The Sewing-Machine Companies*, (18 *Wallace*, 553,) and which views were applied by this Court in *Pettersen v. Chapman*, (12 *Blatchf. C. C. R.*, 395,) to the case of a removal under the clause of the same 2d section which provides for the removal of a suit in which there is "a controversy between citizens of different States," require that this application should be granted. The plaintiffs must all of them be citizens of a State, and the defendants must all of them be foreign citizens or subjects. The plaintiffs are not all of them citizens of a State. Two of the plaintiffs are aliens. The requisite jurisdictional citizenship must exist as to each individual plaintiff. The party on each side, though consisting of several individuals, is, for the purpose of removal, to be considered as one individual. It is the "party" who alone can remove the suit. This case stands in no different position from that which it would occupy if Sawyer had not been a member of the copartnership, in which case, the suit being one

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between foreign citizens on the one side, and foreign subjects on the other, the case would not be removable under the section in question. The rule is especially applicable to a case like this, where the alien members of the copartnership are necessary parties to the suit.

An order must be entered remanding the case to the State Court.

Clarence A. Seward, for the motion.

Simon Sterne, opposed.

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The New Haven and Northampton Company, a railroad corporation, owning a dock at New Haven, refused to receive coal on its cars, on said dock, from a canal-boat lying thereat, unless the master of the canal-boat would employ shovellers designated by the company, at a price fixed by the company, which was intended to be, and generally was, the ordinary market price, to shovel the coal on board of the canal-boat into tubs belonging to the company, which tubs were then to be hoisted, by means of a derrick on the dock, so that the coal could be dumped into such cars. The canal-boat paid ten cents per ton to the company for the use of the tubs and machinery: *Held*, that the requirement of the company was not a reasonable one and could not be enforced.

(Before BLATCHFORD, J., Connecticut, May 20th, 1878.)

THIS was an appeal from a decree of the District Court in a suit *in rem*, in Admiralty. The decision of the District Court, (SHIPMAN, J.,) was as follows:

“The New Haven and Northampton Company is a railroad corporation duly incorporated by the Legislature of the State of Connecticut, and owning and operating a line of railroad, for the transportation of persons and goods, from New Haven, Connecticut, to Northampton, Massachusetts. Said

corporation is a common carrier, and a considerable portion of its regular business is the transportation of coal from New Haven to the various places upon the line of its railroad. This coal is brought from different coal ports to the port of New Haven, in coal barges, or in coal vessels, and is delivered to said railroad company upon its dock in said city, commonly called the Canal Dock. About 140,000 tons of coal are annually received at this dock. By the universal custom of the port of New Haven, which custom was known, understood and assented to by the libellants, and in conformity with which custom the contract evidenced by the bill of lading hereafter recited was entered into by them, coal consigned to a railroad company, or to consignees upon the line of a railroad company, and which coal is to be transported by the railroad company, as an intermediate carrier, must be delivered to said company in its coal cars, unless some other place of delivery is expressed in the bill of lading. The said New Haven and Northampton Company, for the convenient, speedy and economical delivery of said coal, has erected upon the Canal Dock derricks furnished with buckets or tubs, which derricks and buckets are operated by steam power. The buckets, being lowered upon the deck of a coal barge lying alongside of the dock, are filled with coal by shovellers upon the vessel, who are paid by the owners of the barge, and the buckets are moved by steam power over the coal car, and the contents are dumped into the car. For the use of this machinery and these appliances, the railroad company receives ten cents per ton from the barge owner. This method of delivery is the ordinary one, and is the method which the railroad company has provided, both for its own accommodation and for that of the barge owners. In the present condition of the wharf, which is traversed on one side with railroad tracks, which are being occupied with cars and engines, the only practicable method of delivery, and the only practicable place from which delivery can be made, is under the derricks. The duty of the shovellers is swiftly to fill the buckets from the vessel. Prior to September 4th, 1871, the shovellers were always selected

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by the captains of the barges, and were paid directly by them. On that day said railroad company established the following rule, printed copies of which were posted conspicuously upon the wharf: 'New Haven and Northampton Company. Special notice. All coal vessels discharging at the Dock of the New Haven and Northampton Company will be under control of the dock-master from time of arrival till discharged, and he will furnish men to discharge their cargoes. Chas. N. Yeamans, Vice-Pres't and Supt. M. C. Parker, Gen. Freight Agt.' Under this notice, the railroad company has claimed the exclusive right to furnish, at the regular price, shovellers to discharge coal cargoes, and to refuse to receive coal unless these shovellers, so furnished at such regular price, were employed by the barge captains; and, if this latter rule is not embraced in the notice, there has been such a rule, in addition to the notice, well understood by the owners of barges generally, and by the libellants. The libellants have known that the railroad company would not allow coal to be discharged at their wharf, except by shovellers whom they selected and furnished to the captains. The company has derived no pecuniary benefit from furnishing the shovellers, who were paid nothing except for shovelling, and who performed no service for the company. They were paid from September 4th, 1871, to the date hereafter mentioned, uniformly ten cents per ton, which sum was paid by the captains of the barges to the dock-master, with the amount of the bill for hoisting and dumping, and by him paid to the shovellers. This rule was adopted by the company because they deemed its adoption to be a convenience and benefit to the freighting public. Previous to the time of its adoption, a strike had occurred among the shovellers, and delays had occurred arising from the shovellers absenting themselves, or deserting after they had been hired. Since the adoption of the rule, delivery of coal has been more rapidly conducted, and fewer delays have occurred. The consignees of coal deem the rule a reasonable one. From September 4th, 1871, until a short time prior to April 22d, 1876, the uniform price for shovelling, in New Haven, had been ten

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cents per ton. In the spring of that year, this price began to break, and coal was shovelled at other wharves at eight cents per ton, and good shovellers could easily be obtained at that price. The general and customary price in New Haven had not, however, then dropped to eight cents, and had not been lowered at the Canal Dock. The officers of the railroad company were not aware of this breakage in the market. The Derby Railroad Company has a similar rule. The New York, New Haven and Hartford Railroad Company, which receives about 250,000 tons of coal annually at its wharf, does not have such a rule. All the companies have similar facilities for hoisting and dumping, for the use of which compensation is paid by the barge owners. No question is made in regard to the reasonableness of requiring this compensation. On April 19th, 1876, the libellants, who are the owners of the barge Joseph Wilkins, received on board said boat, at Brooklyn, N. Y., 318½ tons of coal, for delivery to the Glasgow Company, at the Canal Dock in New Haven. The agreed rate of freight was sixty cents per ton. The Glasgow Company is a manufacturing corporation at South Hadley Falls, in Massachusetts, a place upon the line of said railroad. Said coal was to be delivered to said railroad company, as an intermediate carrier, and was by said company to be then carried and delivered to the owners. A bill of lading, of which the following is a copy, was signed by the captain of the Wilkins: 'New York & Eastern Department, North 8th, 9th & 10th St. wharves, Brooklyn, E. D., April 19, 1876. Received, in good order, from the Philadelphia & Reading Coal & Iron Co., on board the Bt. Joseph Wilkins, whereof I am master, 318½ tons of coal, (2240 pounds each,) which I agree to deliver to Glasgow Co., Canal Dock, New Haven, danger of the seas excepted, they paying freight for the same, at the rate of 60 cts. per ton. No. 491. Advanced to captain, \$9 55, for "trimming." No. of tons, 318½. Freight, per ton, 60 cts. C. F. Smith.' The libellants were aware of said rule of the railroad company in regard to shovellers, and were also aware that shovelling could be hired at eight cents per ton. Said barge arrived at the

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Canal Dock on April 22d, 1876, and the agent of the libellants informed the railroad company of its arrival, and his readiness to deliver the coal. He also said that he should employ his own shovellers, unless the railroad company would furnish laborers at eight cents per ton. He was willing to employ the shovellers whom the company might furnish, if they would furnish at eight cents. The boat was placed under the derrick designated by the company. The libellants' agent hired his shovellers at eight cents, and was ready, and offered, to enter upon the discharge and delivery of the coal, into the coal cars of the company, upon its wharf. The company refused to put on steam, or to receive the coal at that place, unless the barge employed its shovellers at ten cents per ton. The barge was removed to another point, so as to accommodate an incoming barge, and, after various interviews between the libellants' agent and one of the libellants, with the proper officers of the company, and a delay until May 1st, 1876, the stipulation mentioned in the 12th article of the libel and the 12th article of the answer was entered into, and the vessel was discharged on May 2d, 1876. Five days are allowed for discharging a 300 ton coal vessel in New Haven. The ordinary demurrage for coal vessels is six cents per ton. The said rule of the company is an unnecessary one in the present condition of the coal traffic in the port of New Haven. I find that the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 11th and 12th articles of said libel, and the 5th and 12th articles of the answer, are true. The amount of freight upon said coal, less the amount which was paid, is \$171 55.

“In the above finding, I have omitted to enter into the details of various conversations between said parties, or the details in regard to the removal of the barge from one point to another, believing the same not to be necessary to the decision of the point in issue between the parties, which is the validity and reasonableness of the rule of the railroad company, which requires that coal should be unladen from vessels lying at its wharf, by shovellers selected and furnished by the company at the ordinary price which is paid for the same service at other

wharves in the harbor. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the person entitled to receive the coal, at the usual and reasonable time and place, and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event, the contract of affreightment was complied with by the libellants, and freight was earned. No question was made as to the liability of the defendants under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the Canal Dock. It is admitted that the company, upon notification that the coal was ready to be discharged, replied that said cargo might be forthwith discharged, and would be received by it for the defendants.

- “The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used, (*Croucher v. Wilder*, 98 *Mass.*, 322;) but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported, in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company, as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. ‘Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. * * * As they hold themselves to the world as common carriers for a reasonable compensation, they

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assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and, if they refuse, without some just ground, they are liable to an action.' (2 *Kent's Comm.*, 599.) A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation. (*Crouch v. L. & N. W. Railway Co.*, 14 *C. B.*, 255.) The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries 'for all people indifferently.' But, while admitting this duty, the company has declared, that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shovelling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner—you shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is

the duty of the carrier, for which he is responsible, and should be in his own control. (*Beadell v. Eastern Counties R. Co.*, 2 C. B., N. S., 509.) It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners. The fact that the barge owners are using, for a compensation, the derricks and tubs of the railroad company, is not material. The berths under the derricks have been designated by the company, as proper places where coal is to be received, and, under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the places designated by the company for delivery, without the use of the railroad company's machinery.

“It is true, that, under this rule, the delivery of coal into the cars of the railroad company has been more expeditiously performed, and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not, of itself, an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say, that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company; but, in the present condition of the coal traffic at the port of New Haven, this necessity does not exist. The power is a convenience to the railroad company. It is not a necessity for the transaction of business.

“It is not necessary to consider the inconveniences which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule presupposes that the same price is to be charged by the employees furnished by the railroad company, which is generally paid by others for the

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same service. When prices are unvarying, no serious trouble results. There is no alternative, however, for the barge owners, but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and then have the question of rates determined by litigation. The result would be, that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment, they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor.

“As matter of law, it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. ‘Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage.’ (*Wordin v. Bemis*, 32 Conn., 268.)

“The libellants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less \$19 55, the amount paid, to wit, the sum of \$171 55, and for damages in the nature of demurrage, for a detention for six days, being \$114 66.”

Simeon E. Baldwin and William K. Townsend, for the libellants.

Johnson T. Platt, for the claimants.

BLATCHFORD, J. The decision of this case in the District Court was placed upon the ground, that the New Haven and Northampton Company, as a common carrier, had no right to impose on the canal-boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ, to place

it there, shovellers designated by the company, and pay such shovellers the rate of compensation fixed by the company for such service. It is contended, in this Court, by the claimants, that the District Court ignored the status of the company as a wharf-owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact seven cents per ton for coal discharged at its wharf, as wharfage; that the libellants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company, in the way of derricks, hoisting engines, &c., is the use of the wharf; that all which the company did, was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shovelled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company, as a wharf owner. The difficulty with this view of the case is, that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and, if any payment was to be made for the use of the wharf, by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptance of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., Canal Dock, New Haven"—the Glasgow Company being a mill owner at a place on the line of the railroad company, and the latter company being the owner of the Canal Dock at New Haven, with its tracks running to and on the dock, and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the tracks—the coal was delivered by the boat into the tubs, and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately

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for the hoisting. If the company had a right to charge the boat for tying up to, and using the spiles on, the wharf, no such charge was made. There was, therefore, no foundation for the requirement as to the shovellers, in any relation between the company as a wharf-owner and the boat.

The imposition of the requirement by the claimants' agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the District Judge, in his decision in the Court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable, it would have been reasonable. It might, indeed, have been reasonable without being necessary. But, to be reasonable, it must be reasonable as respects both parties. In the present case, the effect of the requirement was to impose on the boat an unnecessary expense of two cents per ton of coal, for shovelling into the tubs.

There must be a decree for the libellants, in affirmance of the decree below, with costs.

FRANCIS A. BROOKS AND OTHERS

vs.

THE VERMONT CENTRAL RAILROAD COMPANY, JOHN GREGORY SMITH, WORTHINGTON C. SMITH AND JOSEPH CLARK. IN EQUITY.

Holders of some of mortgage bonds of a railroad corporation brought a suit in equity, in this Court, against the corporation, and three individual defendants, who were trustees in the mortgage, to foreclose the mortgage, and remove the trustees. To the foreclosure portion of the bill, the corporation pleaded the pendency of a foreclosure suit in a Court of the State, but, as that suit was not between the same parties or those fully authorized to represent the same parties, in the same behalf and for the same relief, the plea was overruled.

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To the part of the bill relating to the removal of the trustees, they pleaded, that what was alleged against them, in the bill, as ground for their removal, had been done by them, but in other relations to the property and in other capacities, under the direction of a State Court. The plea was held to be bad. The trustees demurred to the whole bill, on the ground, that, to proceed with it, would interfere with the possession and control of the mortgaged property by the State Court, and be a contempt of that Court: *Held*, that, as neither the mortgagors nor any one claiming under them were in possession, such would not be the effect of proceeding with the suit for foreclosure merely, and that the demurrer must be overruled.

(Before WHEELER, J., Vermont, May 21st, 1878.)

WHEELER, J. This bill is brought by the orators, as holders to a large amount of first mortgage bonds of the defendant railroad company, in behalf of themselves and other like holders, not citizens of the State of Vermont, to foreclose the mortgage, remove the trustees in the mortgage, who are the other defendants, and have the mortgaged property declared to be free from any lien claimed upon it in favor of debts held by the trustees, created in its management subsequent to the mortgage. To so much of the bill as goes for a foreclosure, the railroad company has pleaded the pendency of a bill of foreclosure in the Court of Chancery of the State of Vermont for the county of Chittenden, commenced in the year 1856 or 1857; to so much as relates to the lien claimed by the trustees, it has pleaded the pendency of proceedings in the Court of Chancery of the State for the county of Franklin, involving the validity of the same lien; and, to the residue of the bill, other proceedings in the same Court, concerning the mortgaged property. The other defendants, the trustees, have demurred to the whole. The pleas were set down for argument by the orators and a hearing has been had upon them and upon the demurrer.

The sufficiency of the first plea depends upon whether the suit in the Court of Chancery for Chittenden county is between the same parties, or those fully authorized to represent the same parties, in the same behalf and for the same relief. It is not enough that it relates to the same subject, nor that it is founded upon the same instrument. (*Buck v. Colbath*, 3

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Wall., 334; *Watson v. Jones*, 13 *Wall.*, 679.) The bondholders who joined in that suit were Enos Collins, of Halifax, Nova Scotia, John E. Thayer, Gardner Brewer and Charles T. Alwyn, of Boston, Massachusetts, who are not only not any of these orators, but were not, so far as appears, then or ever holders of any of the bonds now held by the orators. So, the orators themselves have not been parties to the institution or prosecution of that suit, nor do they hold under any one, nor are they represented by any one, who has been such a party, unless it be by the trustees.

The mortgage is referred to in, and expressly made a part of, the bill of complaint. The operative part of it is a conveyance, according to the requirements of the law for conveying real property to the trustees. Then it provides for issuing the bonds to an amount not exceeding two millions of dollars, to be dated November 1st, 1851, to be payable November 1st, 1861, and to bear interest at the rate of seven *per cent.*, payable semi-annually. Then it contains the following condition: "Now, therefore, the condition of this obligation is such, that, if the said Vermont Central Railroad Company shall well and truly pay, or cause to be paid, the accruing interest upon said notes or obligations, according to the terms thereof, and shall also pay the principal thereof pursuant to their promise, when the same falls due, then this obligation shall be void, otherwise to remain in full force." There are other provisions in the instrument, creating further rights, but none for defeating the effect of the conveying part, by making payment to the trustees. Defeasance could be made only by payment to the bondholders. Under this instrument the trustees, apart from the bondholders, took nothing but a naked dry trust. Each holder of a mortgage bond has had rights of his own to the mortgage security, and the trustees have, since default of payment, held the legal title for each and for all of the bondholders, and not at all for themselves. The situation became and has been like that where mortgages of farms or other real estate are made to secure several negotiable notes, which are afterwards passed to various holders. In most such cases, the

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mortgage property and the number of holders are very small compared to those here, but the rules of law by which their rights are governed are precisely the same, so far as applicable. In either case, the debts are the principal things, and the mortgage and estate of the holders of the legal title mere incidents. In neither could the ones having the legal title under the mortgage, without the debts, maintain a foreclosure alone. (*Davis v. Hemingway*, 29 Vt., 438.) A suit by the trustees under this mortgage, without joining some of the bondholders, would be wholly without foundation. So, the suit pleaded was not brought without joining some of them in it, as was necessary. But, any bondholder could institute and maintain such proceedings of his own motion, whether the trustees would or not, by making them defendants. (*Jones on Mort's*, §§ 1383, 1384, 1385.)

The suit pleaded was instituted in behalf of all who would come in as complainants. The plea alleges, that it was instituted by the bondholders who joined in it, in behalf of themselves and all other bondholders, without confining it to those who would come in; but those bondholders, clearly, were not agents for the rest, so they could institute a suit for them without they would come in. So, it is to be taken that it was in effect a suit in behalf of the bondholders who did, and all others who would, join in it. There is no doubt but that they could become parties to that proceeding, but they were not obliged to do so. If that suit had proceeded to a decree and an accounting to ascertain the sum due in equity, no one but the orators could present their bonds to be reckoned. If the accounting had been had and a final decree passed without their bonds having been reckoned, they would not have lost their rights. (*Wright v. Parker*, 2 Aikens, 212.) In *Palmer v. Earl of Carlisle*, (1 Sim. & Stu., 423,) and *Lowe v. Morgan*, (1 Bro. Ch., 368,) where parts of debts secured by single obligations and by mortgage were sought to be foreclosed without the other parts, the foreclosures were refused. So, probably, a foreclosure had of such a part would be a bar to another foreclosure of the residue of the same debts. But,

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here, each bond is distinct and separate. In *Montgomerie v. Bath*, (3 Ves., 560.) there was a foreclosure of a part without the rest.

Neither were the trustees agents for the bondholders, before foreclosure accomplished, certainly, to institute any suit or proceeding for enforcing payment of their bonds. (*Sturges v. Knapp*, 31 Vt., 1; *Miller v. Rutland & Wash. R. R. Co.*, 36 Vt., 452.) But, even if the trustees had authority to institute such proceedings in the name of the orators, as bondholders, or to prove their bonds in their behalf, after decree, so as to involve them in the proceeding, they have not done so. The suit has been merely kept on foot in the name of the trustees, by making new trustees parties, as others have disappeared, without, for many years, making any other progress. While the trustees are shown to have continued the cause, it is not shown that the bondholders who joined have survived, or that any others have entered; but, probably, it is to be presumed, in the absence of anything to the contrary, that they still continue to be parties.

The implication of agency of the trustees for the bondholders is not near so strong in this mortgage as in that of the Rutland and Washington Railroad; for, there, the condition was, if the mortgagor "shall pay, or cause to be paid, to the said trustees, or the legal holders, two hundred and fifty bonds, of one thousand dollars each," the conveyance should be void, so that a default could be saved by payment or tender to the trustees, while in this mortgage there is no such provision. And, when that suit was commenced, there had been no default in payment of the principal of the bonds, for, it would not be due for several years after, and it is not alleged that there had been default in the payment of the interest even, on the orators' bonds, or on all the bonds, so as to include them, and there might well enough be a failure to pay it on a part, and not on all, in which case there might be a foreclosure for those on which there had been a default, in which holders of others could not join.

From all these considerations it seems apparent that the

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suit pleaded was not the suit of the orators. They never brought it, nor joined in it, could not discontinue it, and cannot be barred by it. So, the allegation in the plea, that it was, "for the like relief and purpose" as this, must be understood to mean like relief to those parties to that claimed here for these. This plea is, therefore, overruled.

By leave of Court, the orators have amended the bill by striking from the special prayer all that part praying for relief sought by that part of the bill to which the second plea is pleaded. It is urged, for the defendant, that this leaves all the facts in that part of the bill standing alleged, and that the relief could be had under the general prayer, so that, in effect, the bill is the same as before. This is, probably, true. But, the Court understood the application for the amendment, under the circumstances, to be, in effect, a concession that this part of the bill could not be maintained in the face of the plea, or that, if it could, they did not care to undertake to maintain it. If there should be no judgment on that plea placed on the record, the defendant would be left in doubt as to whether it must answer that part of the bill further, which would not be just. To remove the doubt there should be a judgment allowing that plea.

The third plea is pleaded to the residue of the bill. There does not, however, seem to be anything of the residue except that part for the removal of the trustees. The substance of the plea is, that, whatever the trustees have done, alleged in the bill to be in violation of, or in opposition to, their trust, they have done under the direction of the Court of Chancery for the County of Franklin, in proceedings to enforce other rights claimed to exist in respect to the mortgaged property. From the bill and the plea it appears, that the trustees are not now in possession of the property in any capacity. Therefore, there is no question here, on this particular point, in relation to any interference by this Court with the jurisdiction of that, growing out of the possession by that of the mortgage property, by them as its agents or officers. Those proceedings may be a full justification for all the trustees have done under

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them, as to everything except their right to continue to be trustees, and still they may have come out of them with such relations towards and interests in the property, as that their position is hostile, or in opposition to the interests of the orators, of which they are trustees, as alleged in the bill. If so, those proceedings are not now any bar to the substitution of those not so situated in their places. This does not signify that there may not be other considerations on this subject that would be entitled to weight. The point right here is, whether those proceedings alone now should bar removal, and it appears that they should not.

The demurrer of the trustees raises the question, whether the bill, as drawn, can properly be maintained in this Court. The principal reason urged against its maintenance is, that, to proceed with it would interfere with the possession and control of the mortgage property by the State Court, and so would be a contempt of that Court. It was said by the late learned Circuit Judge Johnson, in *Pond v. Vermont Valley R. R. Co.*, (*pamphlet*, p. 31,) with reference to this same subject, that it is no bar to a suit in one jurisdiction, that bringing it may be regarded as a contempt in another. It is for the Court whose authority a party has disregarded, to vindicate its own authority. This is, doubtless, the correct rule, as matter of strict right. (*St. Joe & Denver R. R. Co. v. Smith*, 16 *Alb. L. J.*, 408.)

But, if this were not so, or if, as a matter of comity towards the State Court, this Court would not, as it probably would not, proceed with a cause so as to involve any such interference, it remains to be inquired of, whether proceeding with this suit by requiring the bill to be answered would bring any such consequences. It is quite clear that it would not, unless the property is in the custody of the Court by its officers or appointees, and not in that of individuals or corporations by other authority. The nature of the possession, as shown by the proceedings in the State Court, made a part of this record, has lately been before the highest Court of the State for consideration, and, as this is a question arising under the laws of

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the State, the construction of the State Courts, of the effect of the laws and proceedings, must control. There is some controversy as to what was and what was not settled by that decision. The Court, through Barrett, J., after an exhaustive review of the situation and proceedings up to and including the compromise decree, so called and known, of 1864, says of that decree, (*pamphlet*, p. 35 :) "It was devised and put in form as the outcome of the mind and will of the parties—as the mode of consummating into validity a mutual arrangement by the parties as to their respective rights and interests, and as to the mode and means by which the property was to be held and used in serving and satisfying those interests. That decree adopted what had been created by the Court as a receivership, as known and warranted by the law ; but the administration of it was not left to the judicial judgment and direction of the Court, under the law authorizing and governing a receivership, known to the law as such. Instead thereof, the parties enacted a code *ex contractu* for the administration of the property, and provided *ex contractu* that there should be the formality as of a decree supervening thereupon. Since that the administration has proceeded in pursuance of that fact and of that formality—practically, an administration by the agreement of leading real and representative persons and parties." It is argued that this was said with reference to a different proceeding from this, and that, notwithstanding those might be the views of that Court with respect to proceedings for a sale of the property by the Court, such as were then in hand, it does not show but that the possession of the property was that of the Court. And such seems to be the opinion of the learned Chancellor of the Court of Chancery for Franklin County, as stated in proceedings had before him in respect to the property, since the decision in the higher Court. But, whichever is correct, this case is not affected, unless these proceedings under it would necessarily interfere with the possession of the property. The property has once been surrendered by the mortgagor in pursuance of the mortgage, and it has not since been in possession of the mortgagor, nor of any one

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claiming under the mortgagor, by any title acquired subsequently. The mortgagor has still left to it the equity of redemption of the mortgage. This bill, so far as it is for foreclosure, is brought to foreclose that. The prayer of the bill is, that an account be taken of the sum due in equity, a time of payment thereof fixed, "and, in default thereof, that said Vermont Central Railroad Company, and all persons claiming under it, may be barred and foreclosed of and from all equity of redemption in said mortgaged premises." If there should be a decree upon the bill as framed, it would run, that, in default of payment according to it, the mortgagor and all persons claiming under it should be foreclosed, and forever barred, of all equity of redemption in the premises. It was said, in the argument, that, upon the expiration of the time, this Court would issue a writ of possession to its officer, and, in its execution, conflict of jurisdiction and officers then might ensue. It is true, that, under the statutes of the State, on a decree of foreclosure in the State Courts, a writ of possession issues. (*Gen. Stat. Vt.*, 255, § 74.) But, the processes of the State Courts are not adopted in proceedings in equity in the United States Courts, as they are in proceedings at law. (*Rev. Stat. U. S.*, sec's 913, 914.) Such a decree, not redeemed, would merely cut off the title of the mortgagor, and no process of the Court would be needed to follow it. (2 *Black. Comm.*, 159; 4 *Kent's Comm.*, 180.) But, if a writ of possession should follow the decree, it would run only against the parties to the suit and those claiming under them, which would mean those so claiming by title since the proceedings. (*Jones on Mort.*, § 1411.) In this case there are no such parties so claiming, as appears, and there is no possession of the parties to the suit to be delivered.

Another ground urged in support of the demurrer is, that the bill shows a second mortgage of the property, and that those mortgagees are not made parties. If this was a bill to go further than to foreclose, this ground might be good. But, as a bill for that purpose merely, the subsequent mortgagees cannot be concluded by proceedings to which they are not par-

ties. So, while they would be proper parties, they are not necessary parties. (*Weed v. Beebe*, 21 *Vt.*, 495; *Jones on Mort.*, § 1558.) There are further remedies provided for in the mortgage instrument, one for possession under the mortgage after default for the space of ten days, and another for a sale of the property after default for six months, on demand of two-thirds in amount of the holders of the bonds, in writing, under their hands. These remedies are merely cumulative to, but do not displace, the one by strict foreclosure. (*Cheever v. Birchard*, *Sup. Ct. Vt.*, *Gen. T.*, 1869, *pamphlet opinion of Steele, J.*, 32.) The remedy by possession has been had. There are no allegations of any demand in writing, nor of any facts in the direction of a sale under any provision of the mortgage. So, the effect of any such proceedings is not now in question, and sales under ordinary proceedings for foreclosure are not known under the laws of Vermont. (*Gates v. Adams*, 24 *Vt.*, 70; *Wing v. Cooper*, 37 *Vt.*, 169.)

As this case now stands, these orators, owning a large amount of bonds secured by this mortgage, the trustees of which are so situated as to be interested in opposition to them, seek to foreclose the mortgage, so far as their rights are concerned, in this Court. That they have the right to so proceed in this Court would seem to be well settled by the decision and opinion of another late learned Circuit Judge, Woodruff, in the same cause before mentioned, (*Pond v. Vermont Valley R. R. Co.*, 12 *Blatchf. C. C. R.*, 280,) in connection with the opinion of Judge Johnson. That a similar suit is maintainable in the Federal Circuit Court, notwithstanding there is a suit pending in the State Court in the same District, in which the orator might join or be joined, has been held by Chief Justice Waite, in the Fourth Circuit. (*Parsons v. Greenville & Columbia R. R. Co.*, 1 *Hughes*, 279.) And, that the pendency of a suit in the State Court is no cause for abatement of another suit for the same cause of action in the Federal Courts of that District, seems to have been held by Mr. Justice Clifford, in *Loring v. Marsh*, (2 *Cliff.*, 311.) The doctrine of this latter case is somewhat criticised by Love, J.,

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in *Brooks v. Mills County*, (4 *Dillon*, 524,) so far as it is applicable to suits in the same District. In the latter case, such a plea was held not to be good where it did not allege that the parties were the same.

There are some matters here presented looking in the direction of defences to these bonds, but these matters are not now for consideration in that respect. The question now in hand is not at all whether the bonds are enforceable against the defendant railroad company, or otherwise, but it is, whether the orators have the right to have their rights to foreclose the equity of redemption of their bonds tried in this Court. So far as appears, as these objections are now considered, they have that right.

The second plea is allowed. The first and third pleas and the demurrer are overruled.

Francis A. Brooks and *Edward J. Phelps*, for the orators.

Benjamin F. Fifield, *George F. Edmunds* and *Asahel Peck*, for the defendants.

THE UNITED STATES vs. STEPHEN J. SIMMONS.

After the conviction of a defendant, he moved in arrest of judgment, and the case went to the Supreme Court on a certificate of a division of opinion. After a decision by that Court, the defendant moved in this Court for a new trial: *Held*, that it was too late to make such a motion.

(Before BENEDICT, J., Eastern District of New York, May 27th, 1878.)

BENEDICT, J. The defendant was tried and convicted in May, 1875. There is no minute of any motion for a new trial having been then entered. A motion in arrest of judgment was made, which was argued and re-argued, and, a difference of opinion having arisen, the case went to the Supreme Court

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of the United States, upon a certificate of division. The decision of the appellate Court having been made during the present month, the defendant now applies to have a day fixed for the hearing of a motion for a new trial. The application comes too late. If any objection was intended to be made to the verdict, a motion for a new trial should have been promptly made. No reason for the delay has been suggested, and, to permit such a motion to be now made, after the lapse of three years, and where, as may well be supposed, the witnesses are scattered, would be highly improper. Ordinarily, it is too late, after a motion in arrest of judgment has been made, to apply for a new trial; and, although, when a motion for a new trial and a motion in arrest of judgment have been entered simultaneously, and the latter is first argued, by direction of the Court, the former may be thereafter argued, yet, in a case like this, when the question of a new trial is, for the first time, raised after the decision upon the motion in arrest, it cannot be entertained. The motion is, therefore, denied.

Asa W. Tenney, (District Attorney,) for the United States.

John J. Allen, for the defendant.

CHARLES DEEMS AND OTHERS

vs.

THE ALBANY AND CANAL LINE.

A steam tug was held liable for negligence, in towing a canal-boat in such manner that she collided with another vessel and was sunk, although the written contract of towage contained this clause: "All towing at the risk of the master and owners of the boat or vessel towed."

An unincorporated association of persons was sued as "The Albany and

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Canal Line." It waived process, and appeared by that name, and answered without objecting that it was improperly sued: *Held*, that it could not afterwards raise such objection.

The circumstances stated, under which, in this case, the value of the canal-boat was allowed as upon a total loss.

Where a libellant, in Admiralty, in a cause of collision, has a decree in the District Court, for a specified amount, with costs, and, on appeal, this Court decrees for the libellant, the proper decree in this Court is not a decree for the amount awarded below, including the costs there, with interest from the date of the decree below, nor is interest to be added to the amount reported by the Commissioner below, from the date of his report, but the decree is to be for the amount of the loss at the time of the loss, with interest from the time of the loss, and for the costs in the District Court, without interest on such costs.

(Before WAITE, Ch. J., Southern District of New York, June 11th, 1878.)

THIS was an appeal from a decree of the District Court, in favor of the libellants, in a suit *in personam*, in Admiralty. The respondents, an unincorporated association of persons under the name of "The Albany & Canal Line," were the owners of a line of steam tow boats, of which the steam-boat Ohio was one, and engaged in the business of towing boats for hire, on the Hudson and East Rivers, between Albany and New York. On Sunday, June 11th, 1871, the canal-boat C. M. Deems, with her cargo, consisting of iron, was taken in tow by the Ohio, at Albany, to be towed to New York, under a contract of which the following is a copy :

" Austin's New Line.
Steam
Tow Boats,
Syracuse, Ohio, Austin,
McDonald,
Leave
New York & Albany daily.
J. J. Austin, Agent,
108 Pier, Albany.
A. D. Hoyt, Agent,
17 South St., New York.

Notice. Towing must in all cases be paid in advance.
This company does not insure boats or cargoes.
New York, June 11, 1871.
Charles M. Deems,
Master and Owners,
To Steam Boat Ohio, Dr.
For towing from Albany to New York—
Special contract. All towing

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at the risk of the master and owners of the boat or vessel
towed— \$20.00.

Received payment for owners,
Ableman."

When the Ohio left Albany, her tow consisted of twenty-nine canal-boats, arranged in six tiers, and all towed by a hawser astern. The Deems was the outermost boat in the fifth tier, and upon the port side. The tow was a heavy one for the power of the boat, and, by reason of this fact, she was more than two days and two nights in making her trip, whereas it was usually made in about two nights and one day. Twenty-six of the boats were taken to New York. The remaining three were left at ports to which they were destined, on the way. The Ohio reached Weehawken, on the New Jersey shore, opposite the upper part of New York, between eleven and twelve o'clock on the night of Tuesday, June 13th, and remained there, at a dock, until between three and four o'clock in the morning of the 14th. This was to save the necessity of passing around the Battery, and into the East River, in the night. The start was made in the morning, so as to save the ebb-tide going down the Hudson River, and reach the Battery at slack water. The steam-boat A. Corning was attached to the starboard side of the Ohio, as a helper, when she left Weehawken. The Corning had gone up from New York that morning for this purpose. When the Ohio, with her tow, reached a point on the Hudson River about opposite Thirteenth street, New York, her pilot discovered the steam-ship City of Brooklyn, at anchor a little east of the middle of the river, about opposite pier 39, and fully a mile below him. There was plenty of room to pass on either side, and it was broad day light, and clear. The pilot at once shaped his course to pass on the east side, that being the course usually taken under the circumstances, as the set of the tide was in that direction, and this was known to him. After the pilot had proceeded on this course for a little time, the captain of the Ohio, thinking it better to go upon the other side, gave the pilot orders to that effect. This

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order was given because the captain discovered three barges lying to the eastward of the City of Brooklyn, and above her in the river, but which did not in fact interfere with the passage of the tow upon the course selected by the pilot. Upon receiving the order, the pilot changed his course, so as to pass to the west, and, having gone sufficiently far, as he supposed, to get by in safety, straightened the Ohio on her course down the river. After proceeding some distance further, the captain, discovering that the tide was setting the tow to the eastward, so as to endanger a collision with the City of Brooklyn, gave orders to head further to the west, and himself went into the wheel-house to assist the pilot in putting the wheel over, directing the pilot of the Corning to stop the engine of that boat, so as not to interfere with the movements of the Ohio. Having, as he supposed, taken the Ohio far enough to the westward, he again straightened her down the river upon her course, but the set of the tide was so strong, and the speed of the Ohio, with her heavy tow, so slow, that the boat on the port side of the tow next in front of the Deems swung against the City of Brooklyn, broke loose from her fastenings, and was thrown around, without further injury, upon the east side of that vessel. The bow of the Deems collided with the stern of the steam-ship and the Deems sank almost immediately. The boat next astern of the Deems was broken loose from her fastenings and somewhat injured, but did not sink until she had been towed by the Corning to the flats upon the New Jersey shore. The Ohio proceeded with the rest of her tow, in safety, to her destination in the East River. A contract was made with a wrecking company for raising the sunken boat and her cargo. In this way, about two-thirds of the cargo was saved, but the hull of the boat was so much injured as not to be worth repairing.

Robert D. Benedict, for the libellants.

Cornelius Van Santvoord, for the respondents.

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WARRE, Ch. J. In my opinion, this case is governed by that of *The Syracuse*, (12 Wall., 167,) in which, under a special contract precisely like the one here presented, it was held, that the towing boat was liable, if, through the negligence of those in charge of her, the tow suffered a loss. It is there said, that, "although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and, if these are neglected, and disaster occurs, the towing boat must be visited with the consequences. * * * It frequently happens, in cases of collision, that the master of the vessel could not have prevented the accident at the moment it occurred, but this will not excuse him, if, by timely measures of precaution, the danger could have been avoided." Applying these principles to the facts as found, it seems to me that the loss must be charged to the Ohio. Beyond all doubt, the collision occurred by the want of preliminary caution and foresight, on the part of the captain and pilot, first, in changing her course, after they had started to go upon the east side of the City of Brooklyn; and, second, in not going far enough to the westward, after it had been determined to go on that side, before steadying her upon her course down the river. The set of the tide and the power of the boat were known at the time, and there was abundance of room to make a sufficient offing. The facts in this case are, certainly, as strong against the Ohio as they were against the Syracuse.

The objection to the name of the respondents comes too late. They waived process, appeared by the name in which they were sued, and have answered without taking the exception.

The only difficulty I have had in the case has been in respect to the exception to the Commissioner's report, for allowing the value of the boat as upon a total loss, but, on the whole, I am satisfied that the report is sustained by the evidence. The boat was loaded with iron, and, in raising her, the bow end, to the extent of about one-third her length, was broken

off. She was towed in this condition to the Pavonia flats, and the saved portion of her cargo taken out. She lay there until September 1st, 1871, when she was sold at auction for \$18, no formal survey having been made. There can be no doubt her owners supposed she was not worth repairing, and the evidence, I think, is sufficient to justify them in not attempting to do so. Although the sale took place in New York, while the wreck remained upon the flats, at a distance from the place of sale, there is nothing to show that she did not bring all she was supposed to be worth.

I am satisfied with the disposition of the case made below, and a decree may be prepared accordingly.

On the settlement of the decree, the libellants asked that the amount decreed to them might be ascertained by adding interest to the amount awarded by the decree of the District Court, including the costs there, from the time of the rendition of such decree, or, in case that could not be done, that the amount reported by the Commissioner might be taken as the basis, and interest added to that from the time his report was filed.

WAITE, Ch. J. Such I think is not the proper rule. The decree in this Court is not one of affirmance or reversal, but is an original decree in the suit. The decree below was, in effect, vacated by the appeal. There should, therefore, be no rests in the calculation of the amount due. The damages should be ascertained at the time of the loss and interest added from that date, without rests, until the decree here.

No interest can be allowed upon the costs in the District Court until the final decree here. Until the case is finally disposed of in this Court, it is to be considered as all the time pending; and, interest on costs is not allowed during the pendency of the suit.

The damages at the time of the loss, as shown by the Commissioner's report, may be taken as the basis of the calculation in this case, and interest added from the date of the loss until the date of the decree.

The Franz Sigel.

THE FRANZ SIGEL.

The steamboat W. had the steamboat S. off her starboard side and the courses of the two vessels crossed. The pilot of the W. saw that the S. must encounter a cross tide, and that it would affect her movements. He made no allowance for this and did not give the S. sufficient room. A collision ensued between the two vessels: *Held*, that the W. was wholly in fault.

(Before WAITE, Ch. J., Southern District of New York, June 11th, 1878.)

THIS was an appeal from a decree of the District Court, in a suit *in rem*, in Admiralty, dismissing the libel. About noon of July 19th, 1871, the steam propeller Franz Sigel, of ninety tons burden and seventy-five feet in length, having on board a cargo of sugar and so loaded as to be a little by the head, was on her way up the East River, at a slow rate of speed, from Prentice's stores, Brooklyn, below Bridge street, to the foot of Gold street, Brooklyn, above Bridge street. The weather was fair, the tide strong ebb and the wind fresh down the river. The course of the Sigel was under the Brooklyn shore, not far from the ends of the piers, so as to avoid the strength of the tide. She had been long employed as a steam lighter in the harbor of New York and was well known. Her course at the time was the one she usually took, when employed as she then was, with an ebb tide, and such as those engaged in similar business were accustomed to take under like circumstances. The George Washington, a side-wheel steamboat running on a ferry between Oliver street slip, New York, and the foot of Bridge street, Brooklyn, was at the same time on a trip from New York to Brooklyn. The distance between the two slips is about one mile and the Brooklyn slip is further up the river than that on the New York side. The ebb tide in the East River strikes the New York shore above Corlears' Hook and then sets across to a point near the foot of Gold street, Brooklyn. From there it follows down the Brooklyn shore to a tight dock, known as "Long Dock," situated next above the ferry slip and but a short dis-

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tance from it. This dock extends into the river about ten feet beyond the ferry slip, and about seventy feet beyond the docks above, between it and Gold street. When the tide reaches this dock it strikes off with great force toward the New York shore. This movement of the tide is regular and well understood by all engaged in business upon the river in that vicinity. Skilful navigators always make their calculations to counteract its influences. Upon leaving her New York slip, the Washington headed up the river, under the New York shore, until she reached a point some distance above her Brooklyn slip, when she rounded to and commenced crossing the river, relying upon the wind and tide to carry her down abreast her slip by the time she was ready to enter it. This was proper navigation and the course usually pursued under like circumstances of wind and tide. After the Washington had rounded to and while she was still under the New York shore, her pilot discovered the Sigel on his starboard side, two or three piers below the Bridge street slip. He then gave two blasts of his whistle, which were not heard on the Sigel and were not answered. The river at that point is about two thousand feet wide. The Sigel kept her course, and, when she was about abreast the ferry slip, the engine of the Washington was stopped, she being, at the time, near the middle of the river and heading so as to enter her slip. Nothing more was then done to arrest her progress and she went ahead under the influence of her former headway and the force of the wind and tide upon her port broadside. After the Sigel had passed the ferry slip, she struck the cross tide which set out from Long Dock. This took her bodily out into the river and turned her bow somewhat off her true course. The Washington was then above the Sigel and above her slip. On striking the cross tide, the full power of the engine of the Sigel was put on, and she was forced through the strength of the current and straightened upon her course. Her pilot, then discovering that there was danger of a collision, rang his bell to stop and back, but, before stern way could be got on her, she struck the Washington on the starboard side, just forward of the wheel,

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producing the injury complained of. As soon as the pilot of the Washington saw that the Sigel was being carried out by the tide, he, for the first time, rang his bell to stop and back, but, before the headway of the boat was stopped, the collision occurred.

Welcome R. Beebe, for the libellants.

Henry T. Wing, for the claimants.

WAITE, Ch. J. Upon the facts, I am clearly of the opinion that the collision was caused solely by the fault of the Washington. She saw the Sigel off her starboard side, and the courses of the two vessels crossed. It was the duty of the Sigel, therefore, to hold her course, and of the Washington to keep out of her way. The pilot of the Washington saw that the Sigel must encounter the cross tide, and that, with her speed and load, it would necessarily affect her movements. It was his duty, therefore, to make the necessary allowances for this, and to see that the Sigel had sufficient room to do whatever was required. That he failed in this, is evident from the fact, that, as soon as the Sigel took the sheer, he rang his bell to back, and only between three and four turns of the wheel had been made before the collision occurred. In the meantime, the Sigel had overcome the force of the current and straightened herself up on her course. I agree entirely with the District Judge in the views which he took of the case, (6 *Benedict*, 550,) and a decree may be prepared dismissing the libel, with costs.

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JOSEPH W. DYER AND OTHERS

vs.

THE NATIONAL STEAM NAVIGATION COMPANY.

The owners of a sailing ship and her cargo sued a British corporation, the owners of a British steamer, in Admiralty, for the value of the ship and cargo, lost by a collision with the steamer. The steamer was damaged by the collision, and, in running for a harbor, grounded and then went to pieces. A quantity of anchors, chains, rigging and cabin furniture, of the value of several thousand dollars, was saved from her and received by the respondents. The answer of the respondents set up that the steamer was sunk and destroyed by the collision, and that there was no liability *in personam* against the respondents, for the loss of the ship: *Held*, that, under the Act of March 3d, 1851, (9 *U. S. Stat. at Large*, 685,) as the respondents had not instituted any proceedings to have the limitation of their liability adjudged, and had not surrendered or transferred what was saved from the vessel, they could not have the benefit of that Act.

Held, also, that the respondents, by their delay, and by allowing a final decree to go against them in the District Court, had waived their right to institute such proceedings.

- *Held*, also, that no limitation of liability could be claimed by the respondents under the general maritime law, because they had not surrendered their interest in the steamer.

Whether the Act of 1851 applies to the owners of a foreign vessel, *quere*. •

The jurisdiction of the District Court to enforce the personal liability of the respondents, as a foreign corporation, was properly exercised, by issuing an attachment against its property.

The proper rate of interest to be allowed on the value of the property lost by the collision was 6 *per cent.*, and not 7 *per cent.*

The cargo lost was guano belonging to the Republic of Peru. Under the facts in this case, the proper rule of damages for the loss of the cargo was held to be, neither the market price of the guano at its port of destination, less the costs and charges which would have been incurred from the time of the loss until it could have been placed in such port ready for sale, nor the cost of the cargo at the place of shipment, with the expenses and charges actually incurred, and interest thereon, but the value of the guano in Peru, as an article to be dealt with there by a merchant seeking to export it and realize only a fair mercantile profit on it, such value to be ascertained by deducting from its value at its port of destination, shipping expenses, freight, duties, marine insurance, port charges and commission for selling, and then deducting from the net proceeds 10 to 12 *per cent.*, as a fair average mercantile profit.

(Before BLATCHFORD, J., Eastern District of New York, June 12th, 1878.)

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BLATCHFORD, J. The evidence is entirely satisfactory that the steamer was wholly in fault for this collision, and that the ship was free from fault. The wind was from northwest to north-northwest. The ship was closehauled on the wind, and heading a little south of west. The steamer was heading in such manner that her course crossed the course of the ship at an angle of about two points. The ship showed her green light to the steamer, and the steamer saw that light, and no other light, on the ship, and saw that light a little over the port bow of the steamer. The steamer showed her masthead light and her red light to the ship, and the ship saw those lights, and no other lights, on the steamer, and saw those lights a little over the starboard bow of the ship. The steamer saw the ship's light at a sufficient distance off to have avoided her, and yet the steamer ported and persistently ported, although the ship's light continued to draw towards the bow of the steamer and was not shaken off, as the result of the steamer's porting; and, in spite of the danger which this condition of things indicated, the steamer did not slow, or stop and reverse, until just before the collision. Her speed was so great, when she struck the ship, that she cut off entirely the forward part of the ship and passed some distance beyond her. The ship did not change her course before a collision was inevitable, and it is doubtful whether she changed it even then. She made no change which contributed to the collision or embarrassed the steamer's freedom of action. The answer charges, as faults on the part of the ship, that she had no lookout, and was not properly manned and navigated, and changed her course. No one of these points is established by the respondents.

The foregoing conclusions were those arrived at by the District Court. (3 *Benedict*, 173.) But there is one question which has been presented to this Court, that was not discussed or considered in the Court below. The answer of the respondents alleges as follows: "Respondents, further answering, say, that said steamer Scotland was by said collision sunk and destroyed, and that there is no liability *in personam* against

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these respondents for said loss of the Kate Dyer." Under this allegation the respondents insist, that their liability, as owners of the steamer, did not extend beyond the value of their interest in the steamer and in her freight pending at the time of the collision; that, as the steamer was lost by the collision, and no freight money or passage money was earned by her, the respondents are thereby discharged from liability; and that the District Court had no right to exercise jurisdiction by issuing a writ of foreign attachment against the respondents, and no right to seize any property belonging to the respondents, under such writ. The answer does not state whether the alleged non-existence of liability is claimed under the Act of Congress of March 3d, 1851, (9 *U. S. Stat. at Large*, 635,) or under the general maritime law.

The question may first be considered on the view that the Act of 1851 applies to this case. Under the third section of that Act, the liability of the respondents, as owners of the steamer, for the damages sustained by the libellants by this collision, cannot exceed the amount or value of the interest of the respondents in the steamer and her freight pending at the time of the collision. Section 4 of that Act provided that the respondents might take the appropriate proceedings in any Court, for the purpose of apportioning the sum for which, as owners of the steamer, they might be liable, amongst the parties entitled thereto. The claims sued for and represented by the libellants in this case are the claims for the loss of the ship and of her freight and cargo, and of the personal effects of her master and crew, and of property owned by a passenger on the ship. They comprise all the claims which could exist for any loss or damage growing out of such collision, so far as appears. This being so, and those claims being all before the District Court in this suit, it was easy for the respondents to institute appropriate proceedings in that Court to have the limitation of their liability adjudged, and to have the sum for which they were liable apportioned among the parties making such claims. No such proceedings were instituted, although the rules of proceeding were made by the Supreme Court in

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May, 1872, and some of the testimony as to damages was put in after that time, and the Commissioner's report was made after that time, and the question of damages was heard by the District Court after that time, and the final decree of that Court was not made until July 17th, 1874. Moreover, the 4th section of the Act provided, that it should be a sufficient compliance with its requirements, on the part of the respondents, if they should transfer their interest in the vessel and freight, for the benefit of the persons making claims, to a trustee to be appointed by any Court of competent jurisdiction, to act as such trustee, for the persons who might prove to be legally entitled thereto, and that, from and after such transfer, all claims and proceedings against the respondents should cease. The District Court was a Court of competent jurisdiction to appoint a trustee in this case, but no such proceeding was had.

But, it is insisted by the respondents, that there was nothing in the shape of vessel or freight, or interest therein, or value of interest therein, which existed after the libel herein was filed, on the 17th of December, 1866, to which the Act of 1851 could apply. In *Norwich Company v. Wright*, (13 *Wallace*, 104,) it was held by the Supreme Court, that, by the maritime law, the liability of the owner of the vessel doing damage by collision was limited to his interest in the vessel and freight, and he was discharged by giving up that interest or by the loss of the vessel on the voyage; that, by the English law, as constituted by statute, such liability was limited to the amount and value of the vessel and freight at the time of the injury; and that the Act of 1851 intended, so far as collisions are concerned, to adopt the rule of the maritime law. Therefore, under the Act of 1851, it is sufficient to surrender the vessel and any freight that may have accrued, without paying into Court anything further, and it is not necessary to pay or give security for the value of the vessel at the time of the collision, and of the freight for the voyage. But, to enjoy the benefits of the Act of 1851, so long as there is anything left of the vessel to be surrendered or transferred, or in or of

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which to have an interest capable of being surrendered or transferred, what is so left, or the interest in it, or the value of it or of such interest, must be surrendered or transferred. In the present case, it is shown that there was a large amount of anchors, chains, rigging and cabin furniture saved from the steamer and delivered to the agent of the respondents, and that what was so saved was of the value of several thousand dollars. That was a part of the vessel, and should have been surrendered or transferred, if the Act of 1851 was to be availed of. Nor is there yet time for the respondents to institute proceedings under the Act of 1851. No sufficient excuse is shown, as in *Norwich Co. v. Wright*, for not having taken such proceedings. There was more than two years time after the rules of practice were prescribed in May, 1872, and before the final decree of the District Court was made, during which the proceedings might have been taken in that Court. The respondents, especially in view of the allegation in their answer as to their non-liability because of the alleged destruction of the steamer, must, after allowing a final decree to go against them in the District Court, without instituting any proceedings under the Act of 1851, be held to have waived all right to institute such proceedings now. I have not found it necessary to determine the question, whether the Act of 1851 applies to the owners of a foreign vessel who seek the benefit of that Act.

Undoubtedly, under the general maritime law, the liability of the owner of the vessel doing damage by collision, for the wrongful act or negligence of the master or crew of the vessel, if such owner was personally free from blame, was limited to his interest in the vessel and its freight, and ceased by his abandoning and surrendering those to the parties sustaining loss. But, he could not discharge himself without abandoning vessel and freight; nor, if vessel and freight were lost, could he discharge himself without surrendering all claims in respect of vessel and freight, such as insurance, &c. If, in consequence of the loss of the vessel on the voyage, no interest in vessel or freight remained, the ship owner was

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discharged, but, if any interest in vessel or freight remained, he could not be discharged without surrendering such interest. Therefore, if non-liability be claimed in this case under the general maritime law, the respondents have not put themselves in a position to claim it, because they have not surrendered or offered to surrender what remained of the vessel. On the contrary, the respondents retained what was saved from the steamer, and permitted the decree below to pass against them without surrendering it. If the answer be considered as averring that the steamer was in such wise and to such extent sunk and destroyed by the collision, that, under the rule of the maritime law, the respondents were discharged from liability, then the answer is not supported by the evidence, for there was something left of the vessel, and what was left was capable of being surrendered.

As the personal liability of the respondents was not discharged, a cause of action in the Admiralty existed against them, and the jurisdiction of this Court to administer the relief asked by the libel was properly enforced by the process of attachment issued.

The owners of the ship have appealed because the decree below awards them less than the value of the ship, and because it awards them interest at the rate of 6 *per cent.*, instead of 7 *per cent.*, upon the amount of their damage for the loss of the ship and for her freight, and for the personal effects of the master and crew of the ship. I examined the question of the rate of interest in the case of *The Aleppo*, (7 *Benedict*, 120), and, for the reasons there stated, and in the cases there cited, the rate of interest allowed was correct. The point that the value of the ship was fixed too low, is not insisted on, on such appeal. The proper rate of interest on the value of the cargo is 6 *per cent.*, and the appeal of the Republic of Peru, on that point, is not sustained.

The final decree of the District Court, besides awarding specified sums for the loss of the ship and of the freight on the cargo, and of the personal effects of the officers and crew of the ship, and of the property of the passenger, awarded to

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the Republic of Peru, as owners of the cargo of guano which the ship was carrying, and which was totally lost by the collision, the sum of \$64,731 27, in gold coin of the United States, with interest thereon, in like gold coin, at 6 *per cent.* This amount was arrived at, in the District Court, (7 *Benedict*, 395,) by taking the market price of the guano at the port of New York, and deducting therefrom the costs and charges which would have been incurred from the time of the loss, until it could have been placed in New York ready for sale. It is contended by the respondents, that this rule of damages was erroneous, and that the proper rule in this case is the cost of the cargo at the place of shipment, with the expenses and charges actually incurred, and interest thereon. I had occasion, in the case of *The Aleppo*, (*before cited*), to examine this general subject, and to consider the decisions in regard to it. In that case, a cargo of wool was lost by a collision on the high seas, a few miles from the harbor of Boston, and it was urged, that the proper measure of damages was the market value of the wool in Boston, on the day of its loss, less duties, freight, charges for landing and cost of insurance from the place of loss to Boston; and that the result arrived at by such method of computation would be the value of the cargo at the time and place of its destruction. But, the result of the principles laid down in the cases cited and considered, was held to be, that the proper rule of damages was the value of the cargo at the port of shipment, including the expense of lading it on board and transporting it to the place of collision, with interest at 6 *per cent.* from the time of collision; that all beyond that was expected earnings or profits; and that the loss of them was not a proper measure of damages. The cases in the Federal Courts to which I refer, are those of *Murray v. The Charming Betsey*, (2 *Cranch*, 64;) *The Lively*, (1 *Gallison*, 315;) *The Anna Maria*, (2 *Wheaton*, 327;) *The Amiable Nancy*, (3 *Wheaton*, 546;) *Smith v. Condry*, (1 *Howard*, 28;) *Williamson v. Barrett*, (13 *Howard*, 101;) *The Ocean Queen*, (5 *Blatchf. C. C. R.*, 493;) and *The Vaughan and The Telegraph*, (2 *Benedict*, 47 and 14 *Wallace*, 258, 267.)

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It is urged, that the owner of the cargo must be indemnified to the extent of the loss sustained ; that complete indemnity for such loss cannot be given, in this case, by taking as the rule the market value of the guano at the place of shipment ; that there never was a market price, as the evidence shows, for the guano, at the Chincha Islands, where it was shipped, it having there neither market value nor ascertainable cost ; that, nevertheless, it was an article of value, and could, at the time and place of its loss, have been easily exchanged for gold at a large price ; and that, on any other rule, the recovery for the cargo would be only \$1,424 25, being the cost of preparing it for shipment and the charges incident to shipment. Indemnity for loss, in the sense of the law of damages, is indemnity to a party for his having lost what he once had. In common speech, a party may lose a market, or may lose an expected profit. But that is not correct language to use in considering the law of damages. The value of this cargo of guano, at the time and place of loss, did not embrace any part of the profits which would have been realized on the cargo if it had safely reached New York. It is impossible to take the market price at New York as the standard, without taking in the probable or prospective profits. To say that this cargo could have been sold to arrive, or could have been easily exchanged for gold, at a large price, at the time and place of its loss, does not meet the difficulty. Selling the cargo to arrive, is only selling it to be paid for if and when it arrives, and leaves it subject to the contingencies of the voyage ; and, if it never arrives, the price, which is a New York price, and includes profits, is not paid. The transaction of delivering the cargo at the time and place of loss, on a sale then and there just before the loss, and receiving pay for it on the spot, based on a New York price for it, as if it were at New York, and deducting only the expense of carrying it to, and landing it at, New York, is not a real or probable transaction. It would be a transaction in which the seller would receive all the profit, and take none of the risk, of the voyage, and one which might as well be supposed to take place at the Chincha Islands, in respect to the cargo on board

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of the vessel, as at any point of the voyage short of the port of destination. The fact that the cargo was lost within but a short distance of New York, compared with the length of the entire voyage, makes no difference in principle, because, the fact of its loss at the place where it was lost, by collision, shows that there was greater danger of its loss by collision at that place than at any previous point in the voyage. If the *Scotland* had not run into the ship, she might have been run into by some other ship, nearer to New York, or the cargo might have been lost in some other way, nearer to New York. If the collision had occurred one mile farther from New York, and the cargo had thereby been lost, the rule contended for by its owners might have been urged with equal weight; and so, in respect to any collision farther and farther from New York, embracing even a collision close to the port of shipment. The contingency of a safe arrival of the cargo at New York, so as to enable its owners to realize their probable or prospective profits, was, during the whole voyage, a matter of conjecture, and the result shows that there was not any less peril so near to New York than during the prior part of the voyage. To allow such profits in this case would make it necessary to allow them if the cargo had been lost by a collision close to the Chincha Islands, and would establish a rule which the Supreme Court rejected, in *Smith v. Condry*.

In opposition to this view, two cases are relied on. In *Bourne v. Ashley*, (1 *Lowell*, 27,) the question was as to the value of a whale converted in the Okhotsk Sea. The Court held, that market price was the rule, in the case of articles which had a market price; that the wrong-doer could not escape paying damages by showing the absence of a market for the article; that there was no market price for whales any where, and no market for oil and bone in the Okhotsk Sea; that, nevertheless, the fair value of the whale must be paid for; that that could not be arrived at by conjectural testimony of experts as to what they would be willing to give for whales in the Okhotsk Sea; that the Court was obliged to discover, as well as it might, the value of the whale to a person who hap-

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pened to want it at the time and place in question; that that value must be the price of the oil and bone in some market, less the expense of making the oil and bone out of the whale and getting it to market; and that, as the market of New Bedford was the controlling market of the country, as well as the home port of both vessels, the proper standard was the value at New Bedford of the oil and bone made, or which might have been made, from the whale, less the average necessary expenses of converting the whale into oil and bone, and freight, insurance and other usual charges, with interest on the sum thus arrived at. In *Swift v. Brownell*, (1 *Holmes*, 467,) the question was as to the value of a cargo of oil and bone lost in the Arctic Ocean, by a collision between two whaling vessels. The Court adopted the rule laid down in *Bourne v. Ashley*, and took the price of the oil and bone at New Bedford at the time when it would probably have arrived there, and not the New Bedford price at the time of the collision. Both of those cases proceed upon the principle, that, if there is an ascertainable market value for the cargo at the time and place of the loss, that ascertainable market value is to govern; and that, if there is no such ascertainable market value, and yet the cargo is of value to its owner, the wrong-doer cannot escape by showing that there is no such ascertainable market value. But, to show that there is no such ascertainable market value, it is not sufficient to show that the place of loss was on the high seas, where traffic does not take place, and buyer and seller do not meet in market. That is the case in every case of loss by collision on the high seas; yet, in such cases, if the cargo came from a port of shipment where traffic in it did or could take place, the value there, and not the value at the port of destination, is the rule laid down. The cases of the whale and the cargo of oil and bone, were exceptional cases. The articles in question in those cases were not shipped at any port of shipment where traffic in them did or could take place, and no value at the time and place of loss, predicated upon any value at any port of shipment, could be affixed to them. Whales and their products commence their existence as property on

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the high seas, and their value, if to be dealt with as a value of the property in some market, could, in those cases, be dealt with only as a value in the port of New Bedford. The property had never been in a port, or at a place, where any definite or ascertainable value had been, or could be, given to it, as a market value. Not so with this cargo of guano.

This guano, with all the guano at the Chincha Islands, was the property of the Peruvian Government, which exported it to foreign countries on its own account, and prohibited its exportation by any other parties. It was not bought and sold in Peru as a general article of commerce. Any citizen of Peru was at liberty to take it from the Chincha Islands for use in Peru, without paying anything for it, but he could not export it from Peru. Guano, so taken, was sold in Peru, subject to such restriction as to its use in Peru, at \$12 a ton, gold. But such guano did not form more than one-twentieth part of the guano taken from the Islands. The guano in the Kate Dyer belonged to the Peruvian Government, and cost it nothing but the labor of digging it out and loading it on the ship, and was being exported by it to be sold on its own account and for its own profit. One sale by the Peruvian Government, of 25,000 tons of guano, for \$30 gold, per ton, net, in 1864, to be exported, is shown. The price of guano at New York, at the time the Kate Dyer would probably have arrived there, was, probably, \$60 a ton, gold. The owners of this guano ought to receive, as compensation, a fair indemnity for its actual loss of guano, but not for its failure to realize probable profits. The value of this guano at the time and place of loss, based on its value in Peru, can, I think, be ascertained from the evidence, in such manner as to give to its owner such fair indemnity, and yet not limit it to the recovery of only \$1,424 25, as the expense of shipment, with no value in the guano itself. This can be done without conflicting with the general rule. Because the Peruvian Government paid nothing for the guano, it does not follow that no value, as substantially a market value of it in Peru, can be ascertained. Nor, on the other hand, does the \$12 a ton, gold, or the \$30 a ton, gold, on the exceptional sales referred to, furnish a fair standard of market value.

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Mr. Hobson, a merchant, residing in the city of New York, who has been for 30 years in the business of importing goods from the west coast of South America, and other South American ports, testifies as follows: "Q. Suppose an article of merchandise is produced or obtained in Peru, the same not being there sold as an article of commerce for exportation, and for which there is a market in the United States, what would you, as a merchant, consider its value in Peru, in reference to the net proceeds of its sale in the United States, if it could be bought in Peru for exportation? A. With reference to net proceeds, and looking to a fair average profit, I should think it would be worth from 10 to 12 *per cent.* off from the net proceeds. To get at the net proceeds, I would take out shipping expenses, freight, duties, (if any,) marine insurance, and all port charges here; also, commission for selling. If it could be bought at such rates in Peru, for exportation, that would create a demand for it there, for exportation." By this "fair average profit" the witness states that he means the usual mercantile result, after paying for the article in a foreign country, and all charges on it. There is no testimony in contradiction of this, or naming any other percentage as a deduction for a "fair average profit." The Government of Peru, in respect to its guano, was a merchant, exporting it and selling it in the market of New York, and making a mercantile profit on it. To be sure, the Government made a larger profit on it than the mere mercantile profit, and which larger profit included the mercantile profit; but the value in Peru which is to be ascertained, is the value of the guano as an article to be dealt with there by a merchant seeking to export it and realize only a fair mercantile profit on it. That value is the proper value in this case, and can be readily ascertained in the method testified to by Mr. Hobson. The rate of profit is a matter of expert knowledge, as to which Mr. Hobson, as an expert, can speak. No expert contradicts him, or gives any other rate than that which he gives. Under the customs laws, where actual market value in the foreign port is required to be stated in invoices, it has been held, that, in the absence of sales, or of-

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fers to sell, in the foreign port, the cost of manufactured goods, with a manufacturer's profit added, may be resorted to as a means of ascertaining the market value of such goods in the foreign port. (*Six Cases of Silk Ribbons*, 3 *Benedict*, 536.) In every case where market value abroad is sought to be ascertained, and there is no standard by sales abroad, that method of ascertaining such market value, or its equivalent, must be resorted to, which, under all the circumstances of the particular case, furnishes the nearest approach to such value abroad, as that a fair mercantile profit, and no more and no less, will be allowed to the merchant, in view of the net proceeds at the place of importation. That was the view in the case of the silk ribbons, and that is the view in this case. The decree in respect to the guano will be drawn up on the basis indicated.

On the appeal by the owners of the ship, the respondents must have costs of appeal. On the appeal by the respondents, the appellees, other than the Republic of Peru, must have costs of appeal; and, on such appeal, as between the appellants and the Republic of Peru, the appellants must have costs of appeal. On the appeal by the Republic of Peru, the respondents must have costs of appeal. The decree below is affirmed as to damages, except as to the amount awarded to the Republic of Peru, and it is affirmed as to the costs it awards, except as it awards costs to the Republic of Peru.

Scudder & Carter, for the ship.

Prichard & Smith, for the cargo.

Benedict, Taft & Benedict, for the passenger.

Butler, Stillman & Hubbard, for the steamer.

Van Brunt v. Corbin.

CATHERINE VAN BRUNT vs. AUSTIN CORBIN AND OTHERS.

A suit in which the plaintiff is a citizen of New York, and three of the defendants are citizens of New York, and one defendant is a citizen of Ohio, and one defendant is a citizen of Indiana, and none of the parties are nominal parties, cannot be removed into this Court, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.)

(Before BENEDICT, J., Eastern District of New York, June 13th, 1878.)

BENEDICT, J. This is a motion to remand this cause to the State Court, whence it has been removed by filing a petition and bond, by virtue of the provisions of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) The suit is an action of ejectment. The plaintiff is a citizen of the State of New York. Of the five defendants, three are citizens of the State of New York, one is a citizen of the State of Ohio, and the other is a citizen of the State of Indiana. None of the parties are nominal parties. All of the defendants joined in the petition for removal, and the whole suit is sought to be transferred to this Court.

The right to retain this cause in this Court is sought to be upheld upon the authority of a decision made by Mr. Justice Bradley, in *Girardey v. Moore*, (5 *Central Law Journal*, 78,) where it was determined by that eminent judge, that, under the Act of March 3d, 1875, the right of removing a cause from the State Court to the Circuit Court of the United States, exists in all cases where there are substantial parties, citizens of different States, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same State. I am prevented from adopting this view of the statute, by a decision of the Circuit Judge of this Circuit, in *Pettersen v. Chapman*, (13 *Blatchf. C. C. R.*, 395,) where it was held, that, to authorize a removal under the Act of March 3d, 1875, each individual plaintiff must have a different State citizenship from that of each individual defendant. This decision now furnishes the law for this Circuit, and, in accordance with such authority, it must be

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held, in this case, that, inasmuch as here there is but one controversy, to which all the parties in the suit are substantial parties, and where some of the defendants are citizens of the same State with the plaintiff, the suit is not one in which there is a controversy between citizens of different States, within the meaning of the Act of March 3d, 1875.

This conclusion renders it unnecessary to consider the other grounds of objection to the proceedings. The motion to remand is granted.

Andrew G. Cropsey, for the plaintiff.

Alfred C. Chapin, for the defendants.

THE MARY EVELINE.

Where, in a suit in Admiralty, for a loss by a collision, items of damage are allowed as for a total loss, interest is to be allowed at 6 *per cent.*, from the date of the loss, and not at 7 *per cent.*

Where an allowance is made for the full value of a vessel sunk and lost by a collision, as for a total loss, the expense of raising the vessel, to ascertain the extent of the loss, is a proper charge.

(Before HUNT, J., Southern District of New York, June 13th, 1878.)

HUNT, J. After listening to the arguments of the counsel for the respective parties, I have carefully perused the testimony presented to the Commissioner to whom it was referred to ascertain the damages sustained by the libellants by reason of the collision set forth in the libel. As the result of my examination, I overrule absolutely all of the exceptions to the report of the said Commissioner, except the tenth exception. The tenth exception is, that "the Commissioner reports interest on such erroneous findings at seven *per cent.*, when he should not have reported any interest, or not to exceed six *per cent.*, on the amount of the damage, when properly found."

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The items allowed by the Commissioner amount, in the whole, to \$4,454 75, and, with one exception, are as for a total loss. The item forming the exception consists of "cost of raising the vessel, \$1,000," which is for money expended. This item is immediately followed by a credit of \$550, "cash from sale of the sloop," which, it is proven, was deducted from the \$1,000. This makes the exception so trifling that we are justified in looking at the whole allowance of \$4,454 75 as one for a total loss. Upon this aggregate the Commissioner allowed, as interest, the sum of \$1,484 35, being at the rate of seven *per cent.* from the date of the collision and loss to the date of his report.

In allowing interest at the rate of seven *per cent.*, for the damage sustained, as upon a total loss, I think the Commissioner erred. The rate in such cases is established, in Admiralty, at six *per cent.*, and the exception under consideration is allowed, unless the libellants shall, within ten days after the entry of the order in pursuance of this opinion, file their stipulation deducting one-seventh of said interest, to wit, the sum of \$212 05, from the decree to be entered in this case. If such stipulation be filed as above provided, the said tenth exception is overruled. This point is decided after a conference with Judge Blatchford, and with his concurrence and approval. (See *The Aleppo*, 7 *Benedict*, 120, 136; *Lincoln v. Claflin*, 7 *Wall.*, 132, 139; *Hemmenway v. Fisher*, 20 *How.*, 255, 259; *Allen v. Mackay*, 1 *Sprague*, 219, 225; *Egbert v. B. & O. R. R. Co.*, 2 *Benedict*, 223, 225, 226.)

When the point was started, that there could be no charge for raising a vessel, where the owner was allowed its full value, as upon a total loss, I was somewhat impressed with it. But, both the authorities and the principle of the cases are clear, that, when the vessel is raised for the purpose of ascertaining the extent of the loss, although it turns out that the loss is total, the charge is a proper one. There is, in many cases, no other mode in which it can be determined, whether the loss is total or partial, and a recovery as for a total loss oftentimes could not be had without incurring the preliminary

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expense of raising the vessel. The value of the raised vessel, in the present case, was credited to the expense of raising her. (*The America*, 11 *Blatchf. C. C. R.*, 485; *The Falcon*, 19 *Wall.*, 75; *The Clyde*, *Swabey's Adm. R.*, 23; *The Nebraska*, 3 *Benedict*, 261.)

Let an order be entered in accordance with this opinion.

Richard H. Huntley, for the libellants.

Franklin A. Wilcox, for the claimants.

THE WOODLAND.

A British vessel, in distress, put into the Danish port of St. Thomas. Repairs to her were necessary. N. attended there to the business of the vessel, and, with the connivance of T., the master, made out fraudulent accounts against the vessel, and T. drew three drafts on the owners of the vessel, for over \$6,000, which were expressed, on their face, to be "recoverable against the vessel, freight and cargo." F., in good faith, and without knowledge of the fraud, discounted two of the drafts. They not being paid, F. libelled the vessel and freight, *in rem*, at New York: *Held*, that the fraud of N. and T. did not invalidate the drafts in the hands of F.

Held, also, that the question of a lien on the vessel must be determined by the law of Great Britain, and that, by that law, the master had no right to create a lien on the vessel and freight by any other instrument than a bottomry bond.

(Before HUNT, J., Southern District of New York, June 18th, 1878.)

HUNT, J. In this cause I find the following facts: "The British barque Woodland, owned by the claimants, who are residents of St. John, New Brunswick, in November, 1870, while on a voyage from Montevideo to New York, with a cargo, being in distress, put into the Danish port of St. Thomas, for repairs. Repairs were necessary before she could safely proceed on her intended voyage. On December 24th, 1870, the claimants wrote a letter, from St. Johns, to Captain J. H. Titus, the master of the barque, at St. Thomas, which

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he received on January 11th, 1871, and, before any advances had been made by the libellants, he exhibited the same to them. This letter is set forth in the apostles. J. Niles, who carried on business under the name of J. Niles & Co., attended to the affairs of the vessel at St. Thomas, landed the cargo, and sold a portion of it, on which he received an amount sufficient to reimburse all the moneys expended, and charged commissions and insurance amounting to \$6,875. As to the insurance, none was actually effected, and the commissions are on an excessive valuation. Titus, the master, approved all the bills, drew drafts on his owners for the balance, \$6,106 24, which were expressed, on their face, to be 'recoverable against the vessel, freight and cargo.' Two of these drafts the libellants discounted, and for them this recovery is sought. The third was given by Niles to the master, upon a corrupt understanding, that it was to be his share. The two drafts have not been accepted or paid, and the libellants are the owners thereof. By the law of Great Britain, the master of a British vessel has no implied authority, even when in a foreign port, to pledge his vessel for necessaries, or create a lien thereon by any other form of hypothecation than a formal bottomry bond; and the master of this vessel had no such authority, either express or implied. The vessel and freight only were libelled in this action. The bills were received, and the money advanced upon them by the libellants, in good faith, and without knowledge of the fraudulent acts of Niles and the captain of the Woodland."

Of the facts that the bark put into St. Thomas in distress, that repairs were there made upon her, that the drafts in question were made professedly on account of such repairs, and that the libellants advanced their money upon them, without knowledge of any fraud on the part of Niles and the captain, there can be no doubt.

The bills for the repairs were made out extravagantly, fraudulently and collusively. If the drafts were made by those having authority to act as the agents of the owners of the vessel in such an emergency, and to bind them by drafts

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given honestly and wisely, I cannot see that the frauds of such agents can be charged upon the *bona fide* holders of the drafts, so as to defeat their collection. The captain was not the agent, in any manner, of the libellants, but the agent of the owner and of the vessel, so far as his position gave him authority, and for his frauds the owner is the party responsible. It is proved, affirmatively, by the evidence of the libellants, that they paid their money for the drafts before their maturity, and without knowledge or suspicion of fraud or irregularity; and there is no evidence to contradict their statements. I, therefore, find and decide, that, so far as the fraud and irregularity are concerned, the drafts were not avoided in the hands of the libellants.

Neither am I able to concur in the conclusion, that the authority of the captain was limited and restricted by the letter of his owners, dated December 24th, 1870, and which was shown to the libellants. It is contended that this letter authorizes the captain to draw on Heaney & Parker for the expenses, or on the owners, if it can be better done, or to give a bottomry bond, and that it excludes the authority to create a lien on the vessel in any other form. The language of the letter supposed to have this effect, is as follows: "As soon as Heaney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co., to show their standing. With these, we doubt not, you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry—or, if it could be done better, draw on us, either payable here or in New York, (in gold)." The letter proceeds: "We will merely add, that we hope you will use your best judgment and your best exertions for the interest of 'all concerned,' and, inasmuch as you must have friends to advise and assist you, endeavor to select those who are honest and honorable, and have nothing to do with men who would counsel fraud, as too many are disposed to do when they think they have an opportunity to make money out of underwriters." This is a letter from the owners, at a distance, to their captain, in an emergency,

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giving their advice and counsel, and suggesting what appear to them the best modes of relieving himself and his vessel from the difficulties surrounding them. It advises, first, that drafts be drawn on Heaney & Parker, or that drafts be drawn on them directly, payable either at St. Johns, N. B., or in New York, and that the expense of a bottomry proceeding be avoided. There is not, however, anything that will bear the construction, that he may not resort to any legal method of obtaining the necessary repairs for his vessel. This is strikingly evident from the clause following, where the letter says: "We hope you will use your best judgment and your best exertions for the interest of all concerned." The sum of it is, that the writers suggest what to them, at a distance, appear to be the better modes of raising the money, but leave it, in the end, to the judgment and discretion of the captain. This left it with him to raise the supplies in any manner that the law would permit. If he had raised them by drafts on Heaney & Parker, or by drafts on the owners, there would have been secured the personal liability of the parties named; if by bottomry bond, with the formalities required by law, a lien would have been created upon the vessel. He took neither of these courses, but drew bills upon his owners at ten days' sight, concluding with these words, "which place to the account of disbursements of bark Woodland and cargo, at this port, and recoverable against the vessel, freight and cargo," and signed them as master; "whereby," (the libel alleges,) "he pledged the said vessel, freight and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts or bills of exchange, a lien upon said vessel, freight and cargo;" and the libel prays that the Court may condemn the said vessel, her freight and cargo, to pay the said sum; with interest and costs.

The question here presented is—did the transactions described, or did the drafts thus given and thus expressed, create a lien upon the vessel and her freight? Had this English master of an English vessel authority to create a lien in the foreign port of distress, in any other mode than by a written

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instrument of hypothecation, which made the debt dependent upon the safe arrival of the vessel, to wit, by a bottomry bond? If the vessel had sailed under the flag of the United States, and her master had been a citizen of the United States, this question would be answered in the affirmative. The case of *The Emily Souder*, (17 Wall., 666,) decides, that the furnishing of the supplies and materials in a foreign port of distress, itself creates a lien upon the vessel in favor of the person furnishing them, and that such lien is not destroyed by the acceptance of drafts on the owners, in the ordinary form, making no reference to the lien, and the departure of the vessel from the port of distress, and that the Admiralty has jurisdiction to enforce this lien against the vessel.

But, it seems to be settled, that the question is to be determined by the law of the country of which the master was a citizen, and under whose flag the vessel sailed, and not by the law of the port where the supplies were furnished, or of the country where the lien is sought to be enforced. (*Loyd v. Guibert*, 6 Best & Smith, 100, 117.)

On the point of the right to create the lien otherwise than by bottomry security, reference is made to *Carington v. Pratt*, (18 How., 63,) where Nelson, J., uses this language: "It has been recently held, in the Court of Exchequer, in England, that the master can pledge the ship for repairs, or loan of money for that purpose, in the foreign port, only by bottomry security; and that, in the absence of this, the merchant must look to the responsibility of the owner or master." The point was not decided in that case, but was expressly waived by the Court. In *Stainbank v. Fenning*, (11 Com. Bench, 51,) the master borrowed money necessary for repairs, and gave a mortgage or hypothecation of the vessel for the amount, payable absolutely, and drew bills on the owner for the same, the payment not being made dependent on the arrival of the vessel. It was held, that the lenders could not proceed against the vessel in the Admiralty Court of England, and, therefore, had no insurable interest on which the suit could be maintained. *Stainbank v. Shepard*, (13 C. B., 418,) was an action by the same

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plaintiff against different defendants, upon substantially the same facts, and it was held, that, there not being such an hypothecation as could be enforced in the Court of Admiralty, the payment of the money not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship. Both of these cases were decided upon the ground, that it is essential to the validity of hypothecation, that the sea risk should be incurred by the lender, and that the pledge on the ship should take effect only in the event of her safe arrival. The opinion in the latter case was delivered by Baron Parke, and in the former by Jervis, Ch. J. In each case, as in the case before us, the instrument of hypothecation was accompanied by the drafts of the master upon the owners. Upon the authority of these cases, and from my high respect for the experience and learning of the District Judge who decided this case below, I shall affirm the decree dismissing the libel. (*7 Benedict*, 110.)

The amount in controversy, with the added interest, make this case one which can be carried by appeal to the Supreme Court of the United States, and I make the decision with the less hesitation, knowing that the party can correct the error, if there be one, by such appeal. Should I be mistaken in supposing that there is a right of appeal, I will entertain a motion for a rehearing, and confer with such of my brethren of the Supreme Court as I may be able conveniently to reach.

James Ridgway, for the libellants.

George A. Black, for the claimants.

De Florez v. Raynolds.

RAFAEL DE FLOREZ AND ANOTHER

vs.

CHARLES T. RAYNOLDS AND OTHERS. IN EQUITY.

The invention described in the reissued letters patent granted to Moritz Pinner, November 1st, 1864, for an improvement in tin cans, (the original patent having been granted to Jean Bouvet, June 28th, 1864,) is not a different one from that described in the original patent, although, in the reissue, the device is described as applicable to different forms of construction of cans, and by different modes, from those in the original.

The decision of the Patent Office, in granting a patent, that the inventor had made the necessary preliminary statutory oath, is final.

Soldering a flat strip of metal over a slot, by soldering the edges of the strip to those of the slot, is not different from soldering a round wire into a slot, by connecting the edges of the slot with solder over the wire.

The necessary utility, to uphold a patent, considered.

The requirement, in the patent, that the solder is to be torn, indicates that it must not be of a kind so hard that it cannot be torn.

A person who infringes a patent is liable for the infringement, although what he does may be an improvement upon the patented device.

The proof of infringement was the sale of a can by the defendant, purchased for and by the direction of the plaintiff. The can was sold in the usual course of the defendant's business. On all the evidence, it was held that the defendant was dealing in the infringing cans in such a manner that, except as to the one can referred to, he was liable to account, and ought to be restrained by injunction.

(Before WHEELER, J., Southern District of New York, June 18th, 1878.)

WHEELER, J. This cause has been heard on pleadings, proofs, and arguments. The orators are owners of a patent for an alleged improvement in tin preserve cans, originally issued to Jean Bouvet, in letters No. 43,378, June 28th, 1864, assigned to Moritz Pinner, and reissued to him in letters No. 1,804, November 1st, 1864, and have brought this bill to restrain an alleged infringement, and for an account. The defendants deny the validity of the patent, for the reasons that, as they claim, the invention described in the reissue is different from that covered by the original; that it cannot be

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adjudged, on the proofs, that Bouvet was an original and first inventor, as in ordinary cases, because it does not appear by the record that he made oath that he was such inventor, nor that Pinner made oath that he was, nor that he believed that he was, and that it is not proved, otherwise than by the production of the letters, that he was; that the invention lacks utility; that it cannot be put into use by the method described; that the method described is not the best one for putting it into use; that what is claimed to be an infringement is not so; and that, if it is, no foundation for an account is shown.

The principal grounds of difference between the invention described in the reissue and that in the original, specified, are, that, in the reissue, the device is described as applicable to different forms of construction of cans and metallic vessels, and by different modes, from those in the original. These grounds, to some extent, seem to exist. But, to the extent shown to exist, they do not make it appear that the invention described in each is not the same. That may be used in many different ways, and be applied to many different subjects, and still be precisely the same thing. While this strict identity remains, it is not understood that any departure, however wide, in the reissue, concerning the mode or the subjects of application, will invalidate it. No variance touching the invention itself has been pointed out or noticed. So, that ground of objection must fail.

Bouvet signed a petition for letters patent for the invention, in which he stated that he had invented it, but not that he believed himself to be the original and first inventor of it. The Vice Consul of the United States at Paris, in France, certified that he personally appeared before him and made oath that he verily believed himself to be such inventor, but Bouvet did not sign that statement. So, he did not sign and make oath, both, to any statement of such belief. It is claimed, that both are necessary to show the necessary oath. This may or may not be correct. It is also claimed, that, as it is because patents are granted only upon oath, that

they are *prima facie* valid, in this country, if it is shown that proof of an oath was lacking in the granting, the *prima facie* effect is done away with, and the patent must fail, unless supported by proof to the Court that the patentee was the original and first inventor. But, the law requires the oath to be made before the granting, as a condition precedent to it. (*Rev. Stat. U. S., sec. 4892.*) With the oath, and other requisites, it was within the province of the Patent Office to grant the patent; without it, not to grant it, nor any qualified one, to be valid only on proof of priority of invention. The certificate of the Vice Consul had some moral tendency, at least, to show the necessary oath. It was the duty of the officers of that department to decide whether it was sufficiently shown or not. It must be presumed to have been passed upon according to the requirements of the law; and the law does not leave the validity of the patent open to be inquired into by the Courts, upon that ground, as it does for want of novelty and some other grounds expressly provided for. (*Rev. Stat. U. S., sec. 4920.*) The decision of that tribunal upon that question must be final, like that of others made competent by law to decide. The patent must be considered to be *prima facie* valid, like others.

The question of infringement, or not, is the most important one in the case, and the other remaining ones are so connected with that, that the disposition of that will dispose of most of them. The plaintiffs' device consists in providing for opening cans without cutting the material of which they are made, or melting the solder with which it is fastened, by making a slot around, or nearly around, the part to be removed to open them, placing a wire, round, flattened, or of other shape, with one end projecting outward, into the slot, and connecting the sides of it with solder over the wire, so that, by lifting the wire outward by the projecting end, it will divide the solder and leave the part to be removed free to be taken out or turned outward. The defendants' device consists in placing a narrow strip of metal, with a projecting end, over a similar slot, and soldering the edges of the strip to those of the slot, so that,

by lifting the strip outward, by the projecting end, it will divide the solder at the edges, uncover the slot, and leave the part to be removed likewise free to be taken out or turned outward. A comparison of these two contrivances with each other shows, quite clearly, that they accomplish the opening of the cans, each by tearing the pieces of metal, by the projecting ends, through the solder. The differences most relied upon by the defendants are, that, by the orators' method, they are put *into* the slot, while, by theirs, they are put *over* it, and that the orators use wire, while they use strips, and that the orators solder *over* them, while they solder the edges of them, and not over them. But, the thing to be accomplished is to connect the two edges of the slot by solder, with something between that can be removed without melting the solder, and it can be of no consequence, whether the thing between is in the slot or above it. The mode of unison is the same. Nor can it be of any importance, whether the solder extends all the way over across the intermediate piece, or only over the edges of it. There appears to be no doubt, but that it would be an infringement to use the plaintiffs' device by soldering the sides of the wire to the edges of the slot, without joining the solder over it. And, if the defendants' strip of metal is the equivalent of the wire, it is equally an infringement to join the edges of that to the slot with solder, without soldering over it. It is urged, that the strip is not a mechanical equivalent of the wire, and that, if it is, it was not known to be such at the date of Bouvet's invention. In the original specification, the wire was to be of any desirable shape to fit into the vacant space. This would include a flattened wire, if that shape would be desirable, and then it would be a flat strip of metal. But, if round wire only had been referred to, a strip of metal would be its ready equivalent, for the purpose of occupying a vacant space, to be soldered to. The leading conception and the idea are the same in each case, and those embodied in Bouvet's invention lead readily and directly to the defendants' device.

The defendants have undertaken to show lack of utility, by

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having cans made, as they claim, according to the letter of the specification in Bouvet's patent, which cannot readily be opened as desired. But, these cans are not made according to the specification. The solder extends around under the wire, when, by the specification, it would only extend over it. It is said that they can be made without the solder extending around the wire on the under side, only with difficulty. That may be so; but, if they can be made at all without, the invention may be of some, though not of great, utility, enough to uphold the patent for it. And, then, the solder in those specimens is quite hard. It is true, that the patent does not specify the kind of solder to be used. But, it proceeds, all the way, upon the requirement that the solder is to be torn, which would indicate, to a competent workman, that it must not be of a kind so hard that it cannot be torn. The invention covered by the orators' patent seems to be sufficiently useful to be patentable, and they have a patent for it. If the defendants infringe, they are liable for the infringement, although what they do may be an improvement upon the orators' method.

The infringement shown is by proof of the sale of a can by the defendants, purchased for and by the direction of the orators. It is claimed that the orators so participated in this transaction, that the defendants cannot be liable on account of it. This is, probably, true, and, if this was all the defendants have done, the orators would not be entitled to a decree. But, this can was purchased of the defendants in the usual course of their business, which is some evidence that they are dealing in those articles. This evidence they have not met and denied, but have rather supported. From it, it is found that they are dealing in these infringing cans in such a manner that, except as to this one purchased for the orators, they are liable to account, and to prevent which they should be restrained.

Let a decree be entered for an injunction and an account, accordingly.

William K. Hall and Joseph J. Marrin, for the plaintiffs.

James A. Whitney, for the defendants.

The Stanley Rule and Level Company v. Bailey.

THE STANLEY RULE AND LEVEL COMPANY

vs.

LEONARD BAILEY. IN EQUITY.

B., a patentee, granted to S. the exclusive right to make and vend the invention during the life of the patent, for a royalty. S. sued B., in equity, alleging that he was infringing the patent: *Held*, that, whether S. was a licensee or a grantee, he was suing B. on an infringement, and that the Court had jurisdiction of the suit.

The conditions in the instrument executed by B. to S. were held to be conditions subsequent, and it was held that such right as passed to S. remained till a forfeiture was enforced.

The Victor plane, covered by letters patent granted to Leonard Bailey, December 12th, 1876, is an infringement of the third and fourth claims of the reissued letters patent granted to Leonard Bailey, June 22d, 1875, the original patent having been granted to him August 6th, 1867.

(Before SHIPMAN, J., Connecticut, June 21st, 1878.)

SHIPMAN, J. This is a bill in equity to restrain the defendant from an alleged infringement of the plaintiff's exclusive right to make and vend the bench planes for which reissued letters patent, No. 6,498, dated June 22d, 1875, were granted to the defendant. The original patent was dated August 6th, 1867. The plaintiff is a Connecticut corporation. The defendant is a citizen and inhabitant of the town of Hartford, in this District. On May 19th, 1869, the defendant, being then and now the owner of said reissued letters patent, granted, by instrument in writing, to the plaintiff, "the exclusive right to make and vend said planes, (spokeshaves and veneer scrapers,) on the conditions and for the considerations hereinafter specified, said right to continue during the life of the patents above referred to, or any extensions thereof; that said Stanley Rule and Level Company agree to make and keep on hand a sufficient stock of said planes, (spokeshaves and veneer scrapers,) to supply all demands for the same, and to use

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diligence in the sale of them at their warehouses, to keep an accurate account of all sales made of said planes, (spokeshaves and veneer scrapers,) and to pay to said Leonard Bailey, his heirs, executors, or administrators, the sum of five *per cent.* on the prime cost of manufacturing said planes," &c., as a royalty for said exclusive use, to render an account of sales once in six months, and to pay such royalty within thirty days after the date of the semi-annual accounts. If the patentee should make any improvements upon said planes, the plaintiff had the right to use the improvements upon the same terms as hereinbefore expressed, and without additional royalty. The bill alleges, that, by virtue of this agreement, the plaintiff became the equitable owner of the reissued patent, and that the defendant is infringing its exclusive right by the manufacture and sale, in large numbers, without its permission, of planes made according to and containing the patented invention, or material and substantial parts thereof.

It is agreed, that the defendant is estopped to deny the novelty of said patented invention. He admits, in his answer, his title to the letters patent, and that he entered into said agreement, and that he has made and sold planes called the "Victor plane," but denies that they are an infringement of the reissued patent. The answer alleges, that the plaintiff has violated its agreement, and has, therefore, no right to have the aid of a Court of equity against the defendant. By amendments allowed when the case was argued, this general averment was made definite and explicit. Further time was not asked in which to take additional testimony.

It is not necessary, in this case, the patentee and legal owner of the patent being the alleged infringer, to determine whether, under the recited agreement, the plaintiff is the grantee of such an exclusive right that it can bring suit in its own name alone against strangers who are infringers, or is, as is claimed by the defendant, merely a licensee. In this case, the patentee is the alleged infringer, and the Circuit Court has jurisdiction of the cause, whether the plaintiff is grantee or licensee. When the patentee has infringed his license, and,

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while holding the legal title to the patent in trust for his licensee, has been faithless to his trust, "Courts of equity are always open to the relief of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction." (*Littlefield v. Perry*, 21 Wall., 205, 223.)

It is objected, by the defendant, that the bill is defective, inasmuch as the exclusive grant or license was granted under certain conditions, and it is not affirmatively averred that the plaintiff has kept and fulfilled the conditions, and thus has a continuing right to the enjoyment of the license. Assuming that the terms and considerations of the agreement, in regard to the exercise of diligence in the sale of the planes, and in regard to the payment of royalties, were conditions, and that, for the non-payment, or other non-performance, a forfeiture might be enforced, as for condition broken, the conditions were plainly conditions subsequent, and, until a forfeiture is enforced, the right or title which had theretofore vested remains in the licensee. (*Littlefield v. Perry*, 21 Wall., 205.) In this case, no notice had been given by the defendant, before the date of the suit, of any intention to claim a forfeiture.

The substantial question in the case is that of infringement, and the decision of this question depends much upon the construction which shall be given to the reissued patent, in view of the state of the art at the time of the invention. The portion of the invention which is in controversy relates to the means of adjustment to its work, of the plane iron, in a bench plane having double irons, or a compound plane iron. A compound plane iron, which is an old device, consists of the cutting iron, and an upper cap iron, or break iron, which does not cut, but, by its bevel edge, turns and breaks the shaving, so that it shall not run into the fibre of the wood. The cutting iron is thus allowed to make a smooth cut. Speaking very generally, the two irons are united by means of a screw, one iron or the other having a longitudinal slot, so that the relation of the cutter to the cap iron may be changed when the cutter is worn away by use. The means of adjustment are for the

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purpose of adjusting the plane iron to its work upon the wood, in accordance with the desire of the workman to make a deep or shallow cut.

Two planes are referred to as showing the existing state of the art prior to the invention of the plane of 1867. One was an invention of Mr. Bailey, patented in 1858. In this plane, the two irons were united by a screw, before being inserted in the stock. The plane iron had a centrally located, longitudinal slot, with a circular enlarged orifice at its upper end. The cap iron had a broad-headed clamp screw, the diameter of the head of the screw being greater than the width of the slot, while it was small enough to pass through the orifice at the upper end of the slot. The double iron was firmly secured in the stock by a cap lever. Thus the two irons can be adjusted to each other before being inserted in the stock, and are detachable from the stock, when united. This is the ordinary, and an old, form of compound plane iron. In such a double iron the screw is substantially a part of the cap plate. The plane iron was adjusted by the motion of a travelling seat or bed, which was attached to the stock, the travelling seat being moved to and from the throat of the plane by a lever.

The Hunt plane of 1860 had a compound plane iron, not detachable from the stock, when united. The two irons could not be fastened together, or firmly adjusted, relatively to each other, before being inserted in the stock. When placed in the stock, they were both fastened by a screw to a moving slide, which was a part of the stock. The plane iron was adjusted to its work by a screw mechanism operating upon the moving slide or seat.

The invention of 1867 discarded a travelling seat or slide, and an adjustment of the plane iron by means of frictional contact between itself and the travelling seat, as in the plane of 1858. It connected the adjusting mechanism directly with the cap plate. The compound plane iron of the patent of 1858, that is to say, one in which the double irons were adjustably united before being inserted in the stock, was adjusted by means of a bent lever attached to the stock, and connected

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with the cap plate, and operated by screw mechanism. Overlying the longitudinal slot in the plane iron was a mortise in the cap iron. One end of the lever entered into the mortise, and, as the lever was moved, it positively and directly operated upon the cap iron, and moved forward and downward both cap iron and plane iron, which were clamped together and formed a compound plane iron. The invention consisted of the adjustment of the plane iron in the ordinary compound plane iron, by means of a lever and screw, or equivalent mechanism, which was positively connected with the cap iron at a point always the same, and acting upon the plane iron immediately through the cap plate thus connected with the lever. Adjustment through a travelling seat and its contact with the compound plane iron was abandoned, and adjustment was effected by a lever and screw, or its equivalent, positively acting upon the cap plate. The patentee caused his lever to act upon the cap plate through a mortise in the plate. Modifications of this method of connecting the adjusting mechanism with the cap plate could easily be suggested by mechanical skill, which would not vary the principle of the invention. If the lever should be connected with the cap plate upon its under face, or should be connected by a pin which was attached to the plate and extended through the slot, the principle of the invention would be unchanged. Equivalent mechanism, known at the date of the invention, which accomplished in the same way, and by the same mechanical means, the same result of adjustment by its direct and positive action upon the cap iron at a point always the same, the plane iron having variable relations with the cap plate, and thus with the adjusting mechanism, is protected by the patent.

The third claim of the reissue, is for "the combination of the nut *n*, lever *m*, and plate *h*, with the plane iron, substantially as described." The fourth claim is for "the combination of the plane iron, plate *h*, (cap plate,) and lever *m*, substantially as described." Construed in connection with the descriptive part of the specification, and in view of the state of the art, the fourth claim is for the combination, substantially as

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described, of the cutter iron and cap iron, adjustably united by a screw in the cap iron to the plane iron, (being the ordinary compound plane iron,) and the lever operating, by positive connection with the cap iron, to adjust the cutting iron up and down between the same limits as those in which the cap iron can move.

The infringing device, called the "Victor plane," was patented to Leonard Bailey, December 12th, 1876. It has the compound plane iron of the Bailey patent of 1858, and substantially the double iron of the patent of 1867, with the exception that there is no mortise in the cap iron. The plane iron is adjusted by means of a gear wheel, carrying a crank pin, and secured to the stock by means of a short shaft. The crank pin is connected to a pitman which moves forward and backward, and has at its lower end a circular orifice for receiving the broad head of the screw which clamps the cap iron and plane iron together. Power applied to the gear wheel moves the crank pin and pitman, and, consequently, the screw head, which is a part of the cap plate. The cap plate is adjustably united to the cutting bit by the friction of the screw head, and through the cap plate the cutting iron is moved. The impulse is not directly imparted to the cutting bit, which receives its impulse because it is clamped through the slot, by the screw, to the cap plate. The adjusting device is positively connected with the cap plate and adjustably connected with the plane iron, the cap plate and plane iron are kept in contact with each other by the strong clamp of the screw head, and motion is imparted to the plane iron by means of the positive connection of the adjusting mechanism with the cap plate. As stated by the plaintiff's expert, "in the Victor plane, the impulse of the adjusting device is imparted; through the medium of the cap plate, by a mere inversion of the parts shown in the Bailey reissued patent, that is to say, in the Victor plane the screw is a part of the cap-iron, and forms a projection thereon, extending through the slot in the plane iron, and into a mortise in the adjusting device, whereas, in the reissued patent, a projection on the adjusting

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device extends up through a slot in the plane iron into a mortise in the cap iron ; and, in both devices, the result is precisely the same, to wit, the adjustment of the plane iron through the medium of the cap plate."

It is obvious, that the Victor plane is not the Bailey plane of 1858, neither is it a reproduction of the Hunt plane of 1860. In that plane, the adjusting device was attached to a travelling bed ; and, furthermore, while the Hunt plane has a compound plane iron, it has not the compound iron of the three Bailey planes. The Hunt plane has a compound plane iron in which the two irons cannot be united before they are inserted in the stock. This peculiarity made this plane practically unsuccessful, and, although, theoretically, the Bailey invention may be attached to the Hunt plane, I do not believe that, practically, such a combination would be successful.

The adjusting mechanism of the Victor plane is a well known equivalent for the lever and screw of the Bailey plane of 1867.

The defendant claims that the plaintiff has violated its agreement, in not using due diligence to sell the Bailey planes, and in devoting its time and attention improperly to a sale of a competing plane. The testimony shows that this averment is not at all sustained by the facts.

Let there be a decree for an injunction and an account, in respect to the third and fourth claims of the patent.

Charles E. Mitchell and Benjamin F. Thurston, for the plaintiff.

William E. Simonds and Charles Levi Woodbury, for the defendant.

630 Quarter Casks of Sherry Wine.

630 QUARTER CASKS OF SHERRY WINE.

Casks of wine were shipped to New York, on a vessel, under a bill of lading which stated that the casks were in good order and well conditioned, and said, also: "Weight and contents unknown; not liable for average leakage or breakage." The casks, without reference to their contents, were delivered from the vessel at New York, and placed in the custody of officers of the customs. There was some leakage during the voyage. Some of the casks were empty on their arrival, and others were partially so. The casks were of an inferior quality, and were in poor condition, on their arrival, arising from their quality and the usual perils of navigation. The master of the vessel libelled the casks of wine, *in rem*, in Admiralty, for the freight money, and sued the claimants therefor, in the same suit: *Held*,

- (1.) The vessel was not liable for leakage and breakage not arising from her own negligence.
- (2.) Proof of the inferior quality of the casks threw on the claimants the burden of showing that the injury to the casks was caused by the negligence of the vessel.
- (3.) The burden was on the claimants, of proving that the leakage was greater than the average in such casks.
- (4.) The claimants and the property could be joined in the suit.

(Before WARRE, Ch. J., Southern District of New York, June 21st, 1878.)

THIS was an appeal by the claimants from a decree of the District Court in favor of the libellants, (7 *Benedict*, 506,) in a suit *in rem*, in Admiralty.

Thomas H. Rodman, for the libellant.

Franklin A. Wilcox, for the claimants.

WARRE, Ch. J. On or about April 12th, 1873, John Haurie, Nephew, shipped on board the ship Hudson, whereof the libellant was master, at Cadiz, Spain, 630 quarter casks of sherry wine, to be transported to New York and there delivered to the shipper, or his assigns, he or they paying freight and primage therefor, amounting to \$866 25, in gold. Bills of lading in the usual form, signed by the master, were delivered to the shipper, specifying that the casks were in good

630 Quarter Casks of Sherry Wine.

order and well conditioned, but which contained the following clause: "Weight and contents unknown; not liable for average leakage or breakage." The bills of lading were transferred by the shipper to the claimants, John Osborn, Sons & Co., New York. The whole 630 quarter casks, without reference to what was in them, were delivered in due time from the ship, in New York, and taken to the bonded warehouse of the United States, in the custody of the officers of customs, where they remained at the time of the filing of the libel in this case. There had been some leakage during the voyage. Some of the casks were empty on their arrival, and others partially so. The casks were of an inferior quality, badly coopered and shaky. Upon their arrival they were in poor condition generally, but it does not appear that their bad condition could be attributed to anything else than their inferior quality and the usual and ordinary perils of navigation. The freight and primage payable according to the terms of the bills of lading were duly demanded of the claimants, and payment thereof refused, before the libel was filed. No evidence was offered by the claimants, and there was no other evidence of the negligence of the vessel than the condition of the casks upon her arrival. There was no evidence as to what the average leakage would be upon such a voyage, or that the actual leakage in this case was greater than the average.

The exception in the bill of lading exempted the ship from liability for leakage and breakage not arising from her own negligence.

The burden of proving that the injury to the casks was caused by the negligence of the ship, was cast upon the claimants by the proof of the inferior quality of the casks. As there was no evidence upon that subject, the case of the claimants in this particular has not been made out.

The burden of proving that the leakage was greater than the average, in casks of the quality and condition of these when received on board the ship, was upon the claimants. No evidence having been given upon this subject, the case of the claimants, in this particular, also, has not been made out.

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As the cause of action in this case arises upon a contract which, if it binds the claimants personally, binds also the property, both the claimants and the property may be joined in the suit.

The libellants are entitled to a decree for \$866 25, in gold, with interest at the rate of seven *per cent.* per annum from the time of filing the libel, and for costs.

NATHAN W. POLAND

vs.

THE MARYLAND COAL COMPANY.

Where a vessel was chartered for "a series of voyages" from G. to W., from May 2d to November 1st, with coal as a cargo, each trip, for a compensation per ton of coal, the charterer was not bound to furnish a cargo, at G., on October 19th, unless there was reasonable cause to believe that the voyage could be completed, in the usual way, by November 1st.

As the charter specified what lay days should be allowed for loading, the charterer was not required to furnish a cargo, except at his own convenience, during such lay days.

(Before WAITE, Ch. J., Southern District of New York, June 21st, 1878.)

WAITE, Ch. J. On May 2d, 1874, the schooner Lizzie Heyer, then being in the port of New York, was chartered by the respondent "for a series of voyages from Georgetown, D. C., to Weymouth, Mass., below all bridges, from the second day of May until the first day of November, 1874, charterers to have the privilege of sending the vessel two trips to Boston in lieu of two to Weymouth." The respondent engaged "to provide and furnish to the said vessel a full and complete cargo of coal, under deck, each trip, and to pay * * * * for the use of said vessel, during the voyage aforesaid, two dollars and sixty-five cents (\$2 65) per ton, of 2,240 lbs., delivered at Weymouth. Freight payable on delivery of cargo.

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If to Boston, two dollars and fifty cents (\$2 50) per ton, and three cents per ton per bridge." The lay days allowed by the charter for loading and discharging were "at the rate of one day, Sundays and legal holidays excepted, for every hundred tons of cargo," commencing twenty-four hours after the arrival of the vessel in port, and notice thereof to the respondent, or its agents or consignees. The carrying capacity of the vessel was upward of six hundred tons. Under this charter the vessel made one voyage to Boston, three to Weymouth, and one, by special arrangement, between Baltimore and Weymouth. She sailed from New York to Georgetown, May 3d, and arrived May 10th; was loaded, and sailed for Boston, May 13th, arriving there May 24th; sailed for Georgetown, May 30th, where she arrived June 6th; sailed for Weymouth, June 10th, arriving June 19th; sailed again for Georgetown, July 1st, and arrived July 8th; sailed again for Weymouth, July 15th, and arrived July 26th; sailed for Georgetown, July 31st, and arrived August 7th; sailed for Weymouth, August 9th, arriving August 19th. From Weymouth, by special agreement, she then made a voyage to Baltimore and back, sailing from Weymouth, September 4th, and arriving at Baltimore, September 8th, and sailing from Baltimore, September 10th, and arriving at Weymouth, October 1st. She then sailed from Weymouth, October 10th, and arrived at Georgetown, October 19th. On her last arrival at Georgetown, she reported to the respondent, and demanded a cargo under the charter. At that time the ruling market rate of freight to Boston was one dollar and fifty cents per ton. The respondent offered to put a cargo on board, under the charter, for Boston, if the vessel would agree to deliver it at that place by November 1st. This agreement the libellant refused to make, but he offered to receive a cargo under the charter and enter upon the performance of his voyage. The respondent then offered to load her, and, if she arrived in Boston by November 1st, pay the charter price, but, if after that date, the market price. This also was refused by the libellant. On October 24th, the respondent offered to load the vessel for Boston at one dollar and sixty cents per ton,

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“without reference or prejudice to claims of either party under charter, leaving claims for separate settlement, the captain to stipulate.” This proposition was accepted October 26th. She was accordingly loaded under this arrangement, and sailed October 27th, arriving in Boston November 26th. She was detained on her voyage ten days at Hampton Roads, on account of an accident to her captain. The freight actually paid under this last shipment was \$961 60, while, at the charter rate, it would have amounted to \$1,502 50. This libel was filed to recover the difference, being \$540 90.

The charter party being for “a series of voyages,” the libellant could not be required to receive, or the respondent to furnish, a cargo under the charter, unless there was reasonable cause to believe that the voyage could be completed, in the usual and ordinary way, by November 1st.

The respondent could not be required to furnish a cargo, except at its own convenience, during the lay days allowed by the charter.

After allowing the respondent such time as it was entitled to, under the charter, for loading the vessel, there was no reasonable probability that a voyage to Boston could be completed by November 1st.

The libel should be dismissed. (See 8 *Benedict*, 347.)

George A. Black, for the libellant.

Charles B. Alexander, for the respondent.

Henley v. The Brooklyn Ice Company.

ALPHEUS HENLEY

vs.

THE BROOKLYN ICE COMPANY.

Where there is no special agreement as to the time within which a vessel is to be unloaded, the law implies that it is to be done within a reasonable time after her arrival.

In the present case, it was held that the consignee was required only to use proper diligence in taking off his cargo in the customary way, and that he had used such diligence.

(Before WAITE, Ch. J., Southern District of New York. June 21st, 1878.)

THIS was an appeal from a decree of the District Court, dismissing the libel, (8 *Benedict*, 471,) in a suit *in personam*, in Admiralty.

Franklin A. Wilcox, for the libellant.

Edward B. Cowles, for the respondent.

WAITE, Ch. J. In the summer of 1874, the respondent was engaged in the business of shipping ice from Dresden, Maine, to Brooklyn, New York, for sale to consumers. It had no storehouses in Brooklyn, but occupied a wharf in Wallabout Basin, for the purpose of unloading vessels. Its course of business was to send out from three to six vessels a week from Dresden, according to the demand in Brooklyn, and, upon the arrival of a vessel at Brooklyn, as sales were made to consumers, unload into carts upon the dock for delivery. All the work of unloading was done between sunrise and sunset, and the business was the most active in the morning and evening, but little being usually done at midday. The usual time for the discharge of a cargo of 235 tons was three days. On September 10th, 1874, the schooner *Marcus Hunter*, of which the libellant was master, took on at Dresden a cargo of 235 ⁵⁰⁵/₁₀₀₀ tons, and sailed for Brooklyn. Her bill of lading stipulated

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that the ice and dunnage should be discharged by the respondent, with the assistance of the crew, but made no provision for demurrer or detention. The vessel was detained unusually long upon her voyage, by calm weather, fog, head winds, and the usual accidents of navigation, and did not arrive in Brooklyn until about the 27th of September. The usual voyage was four or five days. While she was on her way, twelve or fourteen other vessels were out. All these vessels arrived about the same time. Five or six came in before she did, and the rest during the next three days. Upon his arrival, the libellant reported to the respondent, and asked to be unloaded. The vessels arriving before the Hunter were given the preference, and, owing to the difficulty of disposing of their cargoes in the usual way, as well as the unusual accumulation of arrivals, she was detained with her load on board until October 9th. The respondent then made sale of six or seven cargoes, including that of the Hunter, at a great sacrifice, to the Washington Ice Company, which had storage houses, and at once sent her to that company to unload. This was completed the next day, and she was then ready to leave. The freight due upon the ice was not all paid before the libel was filed in this case, but, although, at first, objection was made against paying unless all claim for demurrer was released, before the libel was filed, this objection was waived, and an agreement made to pay, leaving the libellant to enforce his claim for detention as he might see fit. The most of the freight was paid before the libel was filed, and the balance, upon demand, a few days thereafter.

There being no special agreement, in this case, as to the time within which the vessel should be unloaded, the law implies that it was to be done within a reasonable time after her arrival. What is reasonable in a particular case depends upon the special circumstances of that case. The libellant is presumed to have known the course of dealing by the respondent with its shipments upon their arrival in Brooklyn, and to have assumed the risks of delay in discharging which were necessarily incident to such a mode of doing business. He might have protected himself against extraordinary detention by a

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stipulation to that effect in his bill of lading. Having failed to do this, all he can require of the respondent is to use proper diligence in taking off his cargo in the customary way. Under the application of this rule the respondent is not in fault. While there was delay in unloading, it happened through no neglect of the respondent. The unusual accumulation of vessels at Brooklyn, caused by the accidents of navigation, necessarily occasioned delay in unloading them in the customary way. This was one of the risks of the business in which the libellant accepted employment, and against which he should have made provision by special contract, if he desired to throw the loss upon the respondent. The respondent used all the diligence which could properly be required of it, under the circumstances, to unload the vessel, after her arrival.

As the respondent had consented to pay the freight before the libel was filed, and the whole litigation has been in respect to the claim of damages for the detention, the respondent, having in fact paid the freight in full, is entitled to costs.

The libel is dismissed, with costs, in both Courts.

THE JAVA.

In the case of a collision between a steamer and a sailing vessel, the burden is upon the steamer to show a sufficient reason for not keeping out of the way of the sailing vessel.

Where, in such a collision, all on the sailing vessel who knew anything of the occurrences which immediately preceded the collision, were lost, it is incumbent on the steamer to make out, by clear and satisfactory proof, any faults charged on the sailing vessel.

A steamer, in mid-ocean, on a dark night, had no lookout on her fore-castle, but had two lookouts on the bridge, one at each end of it. She had her fore-try-sail set, which obstructed the view ahead from the bridge, and she was going at her utmost speed against a heavy sea. Under the circumstances, the lookouts could not reasonably have been required to remain on the fore-castle. The steamer having collided with a sailing vessel: *Held*, that, with the speed of the steamer, and the fore-try-sail set, the lookout was insufficient, and the steamer was in fault therefor.

(Before WAITE, Ch. J., Southern District of New York, June 21st, 1878.)

The Java.

This was an appeal from a decree of the District Court, in favor of the libellants (6 *Benedict*, 245,) in a suit *in rem*, in Admiralty.

William Allen Butler, for the libellants.

Daniel D. Lord, for the claimants.

WAITE, Ch. J. On the 7th of July, 1871, the Swedish bark *Anitas*, of about 455 tons burthen, left the harbor of Portsmouth, England, bound on a voyage to Miramichi, New Brunswick, in ballast, and with a crew of twelve men, all told. At a little before half past ten at night, on the 25th of August, she was run down and instantly sunk by the steamship *Java*, in mid-ocean, near latitude $48^{\circ} 49'$ north and longitude $45^{\circ} 42'$ west. Only one of those on board was saved. The night was dark and cloudy, with a fresh wind from the southwest, occasional showers, and some mist. A light could be seen from two to three miles away, and the hull of a vessel a quarter of a mile. The sea was heavy, though below the average of stormy seas, and confused, as a portion was running from the northwest and a portion from the southwest, the wind having changed four or five hours before from the northwest to the southwest. The *Anitas* was on her starboard tack, under short sail and headed to the eastward of south. The *Java* was headed west-northwest, and proceeding under full steam, about ten knots an hour, but pitching and rolling heavily in the head sea. She was going as fast as she could be driven against the sea, though her usual speed was fourteen knots an hour. With the speed at which she was going, she could be stopped in a distance of one-quarter of a mile. According to the rules prescribed by the master for the navigation of the *Java*, two lookouts are kept on the forecastle at night, when they can stay there with safety to themselves, and the forecastle is the best position on her from which to discover approaching lights and vessels. Owing to the wind, which drove inboard the rain and spray that was being con-

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stantly created by the waves beating against her bows, it was difficult for the lookouts to see ahead from the forecastle. It was also a dangerous position for them to occupy at the speed the ship was going, on account of her rolling and plunging in the head sea. For these reasons, before the collision occurred, the lookouts were withdrawn from the forecastle and placed at each end of the bridge. If the speed of the vessel had been sufficiently reduced they might have remained with safety on the forecastle. The bridge was about forty feet abaft the foremast and one hundred feet from the stem. It is eight feet higher than the forecastle and about forty feet long, extending nearly all the way across the ship. It was protected in front from the weather by a canvas screen about four and a half feet high. The fore-trysail was set, extending nearly all the way from the foremast to the bridge. There were no other sails set. The range of vision for each lookout was confined to the side of the ship on which he was stationed, reaching ahead only about a point and a half over the bow. The foremast is about forty feet forward of the bridge. The Anitas was not discovered from the Java until less than a minute before the collision, when the starboard lookout saw a dim white light about a point on the starboard bow, and directly thereafter a bright, clear red light. As soon as he discovered it he reported to the second officer, who was at the port end of the bridge. The officer went instantly to the starboard end of the bridge, where he saw only the red light. He immediately stepped to the telegraph, signalled to stop the engine, calling out, at the same time, to put the wheel hard a-port, and repeated the order by telegraph. Both these orders were promptly obeyed, but, before the course of the steamer could be changed, or the heading at all stopped, the collision occurred. The master of the Java was in his room on the saloon deck, not more than forty feet from the bridge, when he heard the call to port the wheel. He was awake and dressed. As soon as he heard the call he rushed to the bridge, but, by the time he reached the steps which led to it from the saloon deck, the two vessels came together, and the bark was sunk by the time he

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reached the bridge. The bark was struck a square blow on her port side, a little forward of her mainmast. The only person saved from her was wakened from his sleep in the forecastle by the singing out of the men on her deck. He jumped from his bunk, and, without stopping to dress, went on deck, where he arrived just as the vessels came together. He went below at eight o'clock, and knew nothing of what transpired after that until the collision. The starboard lookout man on the steamer did not see the white light after the red light appeared, and he did not see the red light all the time until the collision. The port lookout man, while he saw the hull of the bark before the two vessels came together, did not see any light, and the second officer did not see the red light after he telegraphed to stop the engine and port the wheel. The bark and her cargo were a total loss, and both belonged to the libellants. The value of the bark and her cargo was 15,894 55 dollars, as of December 31st, 1874.

The Java, being a steamer, was bound to keep out of the way of the bark, a sailing vessel, and the burden is upon her to show a sufficient reason for not doing so. As all on board the bark who knew anything of the occurrences which immediately preceded the collision, were lost at the time, it is incumbent upon the steamer to make out the faults charged upon the bark by clear and satisfactory proof. This has not been done.

A good, clear and bright red light, on the port side of the bark, was actually seen from the steamer before the collision. It may also fairly be inferred from the evidence, that, when discovered, it was fixed and in its proper place. It was certainly on the side of the vessel where it belonged, and neither the second officer nor the lookout, who alone saw it, intimate that it was not in its proper position. They both saw the hull of the vessel, and, if the light had been simply held out from the deck, in the emergency of the moment, as was claimed in the argument, that fact would certainly have attracted attention at the time, and would not have been forgotten. It could not have been displayed after the white light was seen, because

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that would have involved a change of its position, and the lookout does not say that it was moved after he first saw it. He does not remember seeing it all the time until the collision, but it was stationary so long as he had it in view. Neither was the red light changed for the white one which was first noticed. That would have involved some change of position, and all the lookout says upon the subject is, that he first saw a dim white light, and directly after a red one, clear and distinct. From the time the white light was first discovered until the collision, all concede was less than a minute, and, judging from the attending circumstances, it could not have exceeded thirty seconds. It would not have been possible, in that length of time, to have substituted one light for another, or to have displayed a new one, without some movement which must have attracted the attention of those who were watching from the Java.

All the testimony necessarily comes from the men on the steamer. Those on the bark were all lost, except one. He went below at eight o'clock, when, perhaps, the lights ought to have been set; but no inquiries were made of him upon that subject. Coming, as he did, upon deck at the very moment of the collision, it cannot be supposed that he would know anything of the condition of the lights then.

It matters not that no green light was seen, for, situated as the two vessels were, that light would necessarily be out of sight upon the Java, even though it had been brightly burning. Neither does it signify that the red light was not noticed until the moment of the collision. The testimony shows that the hull of a vessel could have been seen, that night, a quarter of a mile away; but the hull of this vessel was not discovered until attention was attracted to it by the lights, although her sails were set. When the light was seen, it was burning brightly and in its proper place. It must, therefore, have been put in position before it was in fact discovered. The fair inference, from all the circumstances, is, that it was properly displayed, and that it was not seen because of an insufficient lookout upon the steamer.

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No rule is better established than that a sufficient and competent lookout is indispensable to the safety of navigation. As much depends upon the care and attention of those who watch for danger, and report to the officer in command, as upon the officer who directs what shall be done when the report is made.

A powerful steamer, at full speed, on a dark night, although in mid-ocean, has no right to omit any duty which belongs to such a situation. She must almost necessarily destroy any small vessel with which she comes in collision. Her duty is to keep out of the way of any sailing vessel she may meet. It is of the utmost importance, therefore, that she keep a constant and vigilant watch for their appearance. Having the greater power to destroy, she should be the more watchful to preserve. The highest skill is required from her, both in respect to her officers and responsible men. The greater the responsibility, the greater the diligence required.

It cannot, for a moment, be doubted, that two faithful and competent men upon the forecastle of the Java, with their view unobstructed by sails, would be more likely to discover approaching lights and vessels, than if stationed at the ends of the bridge, with the lower sails set upon the foremast. The general orders of the master were, that there should be two lookouts on the forecastle, on any night when they could be there with safety to themselves, and one during the day. They are not to be stationed there when it would unnecessarily endanger their lives; but, clearly, under ordinary circumstances, that is the best place for observation, and, if they are withdrawn to another position, care must be taken that the loss of advantage which arises from the change is made up, as far as possible, in some other way. The best watch that can be secured must in some form be maintained.

On this occasion, the lookouts were withdrawn to the bridge. At the speed the steamer was going, they could not reasonably have been required to remain upon the forecastle forward of the mast. Upon the bridge, with the fore-trysail set, it must have been obvious to all that their view was obstructed. If it was necessary to keep the sail up, to steady

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the ship, something should have been done to compensate for the loss its maintenance in that position entailed. Sometimes, when a man cannot be stationed upon the forecastle forward of the mast, he may, with propriety, be kept at the mast. It matters not that this may require the employment of additional force upon that duty. If needed, it should be supplied. But, if that cannot be done, or something else reasonably sufficient for the accomplishment of the object in view, the speed must be slackened. In all cases, speed must yield to safety, when required.

In this case, nothing was done upon the Java to make up for the loss in the position of the lookout. The sail was not taken in, no attempt was made to keep a lookout at the foremast, and the speed was not slackened. On the contrary, the vessel was driven at her utmost speed, under the circumstances. The lookouts either did not or could not perform their duty, and the loss occurred. In my opinion, the steamer was solely in fault, and should make good the damages.

The testimony taken since the hearing in the District Court does not materially affect the case. I do not place the most implicit confidence in all that is said by some of the witnesses, but, were it all true, the result would not be changed. It is of no consequence that the bark did set out upon her voyage with a short supply of oil, if, as I think is fully established, she was sailing with the proper lights on the night when the collision occurred. With proper and vigilant lookouts, stationed where they ought to have been, upon the steamer, and performing their duty, it is probable the accident would not have happened.

A decree should be rendered in favor of the libellants, for the agreed damages, \$15,894 55, and interest from December 31st, 1874, with costs.

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A., the master and owner of the canal boat M., filed a libel *in rem*, in Admiralty, in the District Court, against the screw steamer C., for himself and for an insurance company, alleging that the company was the insurer of the cargo of the M., and that the M., and her cargo, had been damaged by a collision between the M. and the C., through the fault of the C. The libel did not allege that the cargo was owned by an innocent party, nor that the insurance company had paid the loss. The collision occurred in a slip, as the C. was moving out. The District Court held that the C. was in fault for allowing herself to be drawn over toward the M., by a stern line fastened to the opposite pier, which was not cast off in time; and that the M. was in fault for being insufficiently fastened, so that she was drawn over towards the C. by the suction caused by the screw of the C. On appeal by both parties, this Court held, for the same reasons, that both vessels were in fault, and made a decree holding the C. liable for only one-half of the damages sustained by both the M. and her cargo.

After the decision of this Court was announced, the insurance company moved (1) that it might be allowed to prosecute the suit for its own interest; (2) that it might be made a party libellant, and allowed to prove that the cargo on board the M. was owned by an innocent party, that it was insured against loss by the company, and that the loss had been paid in full; (3) that the record brought up on appeal might be amended by inserting in the apostles the minutes of the Commissioner, on the reference in the District Court to ascertain the amount of damages; and (4) that a decree might be entered against the C., and in favor of the insurance company, for the full amount of the damages to the cargo: *Held*,

- (1.) That the company might, if necessary, be admitted as a party, in order to settle its rights to its share of the recovery, as against the libellant, but only to that extent;
- (2.) That, as the M. was sold three times between the time of the collision and the time of the decree of the District Court, and as the remedy over against the M., in favor of the C., had been lost by the delay, the company could not now be allowed to make proof of the innocent ownership of the cargo, so as to charge the C. with the entire damage to the cargo, under the rule established in *The Atlas*, (93 U. S., 302,) although the decision in *The Atlas* was not made until after the libellant had appealed;
- (3.) That, as the report of the Commissioner was not excepted to, it was not necessary that his minutes of testimony should be brought up;
- (4.) That there could not be a decree against the C. for the full amount of the damages to the cargo.

(Before WARRZ, Ch. J., Southern District of New York, June 21st, 1878.)

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IN this case, there were appeals by both parties from a decree of the District Court, in a suit *in rem*, in Admiralty, in a cause of collision, finding both vessels to have been in fault, and dividing the damages.

Robert D. Benedict, for the libellant.

James W. Gerard, for the claimants.

WAITE, Ch. J. The libellant was, at the time of the occurrence hereinafter mentioned, the master and owner of the canal-boat *Montana*, having on board a cargo of wheat, taken in at Oswego, New York, to be transported to New York city, and there delivered to Tompkins & Co., consignees. Between two and three o'clock in the afternoon of November 11th, 1871, the boat, with her cargo, was moved into the slip between piers 44 and 45 North river, in New York city, for the purpose of having her cargo transferred to the steam-ship *Erin*, then moored along the North side of pier 44. The *Erin* was a sea-going steamer, 370 feet long and 41 feet wide, lying with her bow towards the river, and her stern near to an L, on pier 44, forty-seven feet wide, and extending one hundred and thirty feet from the bulkhead of the slip at the street. The *Montana* was ninety-six feet long and seventeen feet six inches wide. Soon after her arrival in the slip, she was moored along side of the lighter *Fret*, twenty-three feet wide, and from sixty to seventy feet long, which lighter was made fast to the *Erin*, opposite the after hatch of that vessel, with her bow towards the bulkhead, by lines leading from her deck, bow and stern, to the deck of the *Erin*. The deck of the *Erin* was much higher out of water than that of the *Fret*. The *Montana*, with her bow also toward the bulkhead, was made fast to the *Fret* by lines from her stern and middle cleats, which latter cleat was about her midships, to the bow and stern of the *Fret*. The decks of these two boats were about equal distances above the water. The bow of the *Montana* extended from twenty-five to thirty feet beyond that of the *Fret*, and there was no line from it either to the *Erin*

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or the pier. A floating elevator, twenty-four feet wide, and one hundred feet long, was made fast to the Erin at her middle hatch, between the Montana and the river. Outside of, and made fast to, this elevator, was a grain barge seventeen feet six inches wide, and one hundred feet long. The slip was one hundred and sixty feet wide at the river, and varied from that to 163 feet, until it reached the L. From there to the bulkhead, it was 115 or 116 feet wide, and, alongside the L, in the narrow part of the slip, two coal barges were moored side by side. The depth of the water in the part of the slip where the steamer laid, varied from 18 to 22 feet. The steam-ship City of Paris, 416 feet long, and forty feet six inches wide, was lying in the slip along side of pier 45, when the Montana came in. Her bow was towards the river, and her stern was on a line nearly at right angles with the end of the L, on pier 44. She was an ocean steamer, and one of a line of packets plying between New York and Liverpool, and leaving that slip on regular sailing days. When the Montana came in, the steamer had her steam up, and there was every indication that she was about to leave upon her voyage. This was observed and understood by the libellant. Some time before she left, she got out lines from her bow and stern, took them across the slip, and made that from the bow fast to pier 44, and that from the stern to the L. By these lines she was worked off from pier 45, ten or twelve feet, so as to avoid collision with her own dock and the sheds upon it, as she moved out of the slip. A short time before starting, the usual whistle was blown. The captain, being on the bridge of his vessel, sent aft to inquire whether all was clear, and, receiving an affirmative answer, blew the last whistle and gave orders to go ahead. The lines leading to pier 45 were let go, but both of those leading across the slip, and made fast upon pier 44 and the L, were held on. No special notice was given from the steamer to the boats in the slip, that she was about to leave, but the libellant, standing upon the deck of his boat, saw what was being done, and knew what it meant. He took no additional precautions to protect his boat

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against injury by the movement of the steamer, supposing what he had done was sufficient. The officers and men on the steamer were in a situation to see how the Montana was moored and fastened, and did see her when the orders were given to go ahead. The movement of a large steamer like the City of Paris out of her slip necessarily causes a displacement of the water, and the revolution of her propeller has a tendency to suck in under her stern, with great force, everything which comes within its influence. This is a fact well understood by all engaged in that business. The stern line leading from the steamer to the L was not let go until she had gone some distance ahead. This caused her stern to swing over towards the Montana. The suction created by the revolution of the propeller drew the bow of the Montana toward the steamer, and, when the propeller passed by the Montana, one of its flanges struck her under water about twenty feet from her bow, causing a leak and damaging the cargo. The boat herself suffered but slight injury. The second officer of the steamer noticed the Montana moving toward the steamer, and called out to stop the engine, but no attention was paid to him, and the steamer proceeded to sea without any knowledge, on the part of her officers, of what had occurred. Usually, when a steamer goes out under the circumstances which existed at this time, the stern line is let go before she is started ahead. No notice was given to the Montana, that any other than the usual course was to be taken in this case. The swinging of the steamer on her stern line contributed directly to the collision which occurred, but still there would have been no collision if the bow of the Montana had not been drawn toward the steamer.

While it is the duty of a large steamer, in leaving her dock, to take care that no unnecessary damage is done to other vessels lying in proximity to her, it is equally the duty of the other vessels to take all reasonable precautions to protect themselves from the dangers to which they will be exposed by her movements. The libellant, in this case, had ample notice that the steamer was about leaving. He saw or could

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have seen her lines passing across the slip. He knew, or ought to have known, that, unless his boat was securely fastened, she would be drawn in under the stern of the steamer and exposed to being struck by the propeller as it passed. He also knew, or ought to have known, that, with the Fret lying close to the Erin, fastened only by lines leading up to the deck of that vessel, she could be moved to some extent outwards into the slip. With his own boat fastened only by lines at her stern and midships, it must have been evident to him that her bow could be swung some distance outwards. He also could and did see that the space between him and the steamer was not more than twenty or twenty-five feet. It needed, therefore, but a slight movement of the two vessels toward each other, to bring them together. Under such circumstances, it was clearly his duty to be specially careful that the bow of his boat, which was the first to be exposed to the action of the propeller, was held fast in its position. It is evident that a line from his bow to the Erin, properly fastened, would have prevented the accident. This simple precaution he failed to take. It matters not that neither of the lines by which he was made fast to the Fret was broken. His boat was left so that she could swing to some extent upon her line midships, and she did do so. This, added to the swing of the stern of the steamer, caused the loss. The libellant was, therefore, clearly in fault.

But the steamer was equally in fault. If her stern line had been cast off before she started, there is no reason to believe that her stern would have gone over toward the Montana, as it could not but do with the line fast. Thus the injury was caused by the combined fault of the two vessels. That of neither was sufficient alone to produce it. The damages of the parties in fault must, therefore, be divided between them.

It is contended, however, that, under the rule as established in the case of *The Atlas*, (93 U. S., 302,) the owners of the cargo are entitled to their damages in full, as they are innocent parties. The libel is filed by the master and owner

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of one of the faulty vessels, for himself and the Pacific Mutual Insurance Company, of New York, and there has been no intervention by any owner of the cargo. It is averred that the insurance company was the insurer of the cargo, but it is nowhere averred or proved that the owner of the boat was not the owner of the cargo, or that the insurance company has paid the loss. There is nothing in the case, therefore, as it stands, to relieve the cargo from the fault of the Montana.

The decree of the District Court is affirmed, and a decree to that effect may be prepared.

Subsequently, the Pacific Mutual Insurance Company moved the Court, (1) that it might be allowed to prosecute the suit for its own interest; (2) that it might be made a party libellant, and allowed to prove that the cargo on board the Montana was owned by an innocent party; that it was insured against loss by the company, and that the loss had been paid in full; (3) that the record brought up on appeal might be amended, by inserting in the apostles the minutes of the Commissioner, on the reference in the District Court, to ascertain the amount of damages; and (4) that a decree might be entered against the City of Paris, and in favor of the insurance company, for the full amount of the damages to the cargo.

WAITE, Ch. J. The original libel was filed by the master and owner of the Montana, "for himself and for the Pacific Mutual Insurance Company of New York." In it the libellant avers, on information and belief, that "the said Pacific Mutual Insurance Company were insurers of about 7,405 bushels of wheat, constituting the cargo," and "that the damage done to the cargo by reason of the said collision, and the flooding of the cargo with sea-water, was so great as to cause an almost total loss of the said cargo to the owners thereof, and that, by reason of the damage done to said canal-boat, the libellant herein, and the insurers of the cargo, have suffered loss," &c. Under these averments there will be no difficulty in framing the decree, if it is desired, so as to separate the

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amount of the recovery on account of the insurer of the cargo from that on account of the owner of the boat. Unless there is a dispute between these parties as to their respective interests, there can be no necessity for the actual intervention of the company. The Court will, upon its own motion, make the necessary separation, if the parties intimate such a desire. But, if the division is not agreed upon, and a controversy arises as to the amount each is entitled to, the insurance company will be allowed to appear and prosecute the suit *to that extent*, for its own interest. The libellant, having admitted that he sued for the company as well as himself, and having succeeded in recovering something for his beneficiary, cannot now object to a separation, in the decree, of that which he recovers in trust from that which he recovers as actual owner. If, therefore, it is necessary that the insurance company should be admitted as a party in order to a full and complete settlement of its rights in the action, as against the libellant, an order to that effect may be entered. In this question the City of Paris is not interested.

Upon the other branches of the motion, an entirely different question arises. The collision occurred November 11th, 1871. The libel was filed December 13th, 1871. At that time the Montana was owned by the libellant, and could have been proceeded against by the owner of the cargo or the insurance company, as well as by the City of Paris. The libel made no claim of any innocent ownership of the cargo. The hearing was had in the District Court without any proof whatever of the interest of the insurance company, and a decision was rendered, June 10th, 1874, finding both vessels in fault, directing a division of the damages, and ordering a reference to ascertain the amount of damages. The Commissioner filed his report February 6th, 1875. No exceptions were taken to this report, and a decree was accordingly entered, February 23d, 1875, dividing the damages as found and stated by the Commissioner. The appeal of the libellant was taken March 1st, 1875, and perfected soon after. Between the time of the collision and the decree below, the Montana was sold and con-

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veyed three times—once July 31st, 1872, again April 29th, 1873, and again June 29th, 1874. To allow the insurance company to make proof now of the innocent ownership of the cargo, would be to allow it to make a new case against the City of Paris, not specifically stated in the libel, after all remedy over against the Montana had been lost by delay. An owner of cargo injured by a collision between two vessels, both of which are at fault, may sue either one or both of the vessels, as he chooses, and recover the full amount of his loss. (*The Atlas*, 93 U. S., 302.) Without doubt, too, the master or owner of the carrying vessel may sue in his own name for the benefit of the owner of his cargo; but if, in such case, a recovery is sought for the full amount of the loss, notwithstanding the fault of the party in whose name the suit is brought, the facts which give the right to such a recovery and the claim should be clearly stated, or otherwise made to appear upon the record. This is because the prosecuted vessel may, in such a case, by some appropriate form of proceeding, call upon the other vessel to respond in the action for its share of the loss. Unless this is so, it would be in the power of the carrying vessel, by commencing suit in the name of its owner, for the benefit of the shipper, to relieve itself from all liability for a loss to its cargo, resulting in part from its own fault.

If the owner of the cargo adopts as his own a suit commenced by the owner of the carrying vessel for his benefit, he is bound by the case which is made on his account. If that case does not disclose his innocence, or his right to claim for his whole loss, even though it happened in part through the negligence of his carrier, he must suffer the consequences of that omission. When this suit was commenced, the Montana could have been sued by the insurance company jointly with the City of Paris, and, if that had been done, each would have been decreed to pay one-half the loss. If the case had been so stated, in the libel actually filed, as to relieve the cargo from the consequences of the fault of the Montana, the City of Paris might have brought the Montana into the suit, to answer for the consequences of her own wrongful acts. This was not

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done, and, down to the time of the decision below and the reference to ascertain the amount of damages, nothing had been done in the case, or stated in the pleadings, which called upon the owners of the City of Paris to take affirmative action for the purpose of relieving themselves from liability for more than one-half the loss, in case the Montana was shown to have been in any respect in fault. Previous to the decision the right of action against the Montana had been lost by laches and delay. At that time, it is conceded that neither the insurance company nor the City of Paris could have proceeded against her. The laches which barred the action is chargeable solely to the insurance company. To allow the company now to make a new case against the City of Paris, and recover for the whole loss, after, by its own neglect, the Montana had been relieved from liability for its share, would be grossly inequitable. If the difficulty rested upon the failure of proof alone, the case would be different. As it is neither the proof nor the libel, at the time of the decision below, would have justified any other decree than the one which was given.

I am aware, that, until the case of *The Atlas*, which was after this appeal, the Supreme Court had never decided that any innocent party could recover from one of two faulty colliding vessels the full amount of his loss, and that, possibly, until that time it may not have been considered necessary to state or prove the fact of innocent ownership, in a case like this. If the rights of the parties had not been changed by the delay, this would be a good reason for allowing the original defects in these pleadings and proofs to be supplied now. In Admiralty, amendments are liberally allowed, and opportunities to supply omissions in proof are freely afforded, when the equity of a case is plain, but care is always taken to see that wrong is not done in that way. Here, as has been seen, the rights of the parties have been changed by the delay, and wrong would be done to the City of Paris if the insurance company is permitted to make its new case. For that reason, I am clear that this part of the motion should be overruled.

It only remains to consider the application to amend the

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record by inserting in the apostles the minutes of the Commissioner on the reference in the District Court to ascertain the amount of damages. The Commissioner made his report February 6th, 1875, stating his findings from the evidence submitted to him, but making no reference to any return of the evidence. It is now said, that the minutes of the testimony were put on file below, February 9th, 1875. In the order of reference the Court did not direct a return of the evidence. No exceptions were taken to the report, and it nowhere appears that the Commissioner was requested by either party to report the evidence. If actually filed, it was never considered or acted upon in the Court below. No question raised below required the Court to examine it. No question is raised here upon the report. All parties appear to be satisfied with the result reached by the Commissioner. Under such circumstances I do not think the minutes of the Commissioner are at all necessary for the proper consideration of the case here. If sent up, they can only be considered in connection with questions raised upon the report. As no such question has as yet been made here, the motion to amend must be denied. If, in any adjustment of the amounts payable to the owner of the boat and the insurance company, respectively, an examination of this evidence shall become important, nothing now decided will be permitted to have the effect of preventing another application to bring it into the record, from the Court below. The practice in Admiralty in respect to the disposition and use of testimony taken before a Commissioner upon a reference to state an account, is not different from that in equity upon a reference to a master for a like purpose. The rule in equity is clearly and correctly stated by Mr. Justice Clifford, in *Union Sugar Refinery v. Mathiesson*, (3 Cliff., 146.)

The motions are all overruled, except that which relates to the allowance of leave to the insurance company to prosecute the suit in its own interest. As to that, an order may be entered permitting the company to appear and prosecute the suit, as between itself and the libellant, to the extent that may

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be necessary for the purpose of ascertaining its share of the recovery from the City of Paris, upon the principle of an equal division of the damages resulting from the collision, between the Montana and the City of Paris. For the purposes of any further prosecution against the City of Paris, the motion is overruled.

LORIN INGERSOLL*vs.*

WILLIAM MUSGROVE AND EDGAR F. MUSGROVE. IN EQUITY.

THE SAME *vs.* DARIUS BENHAM AND OTHERS. IN EQUITY.

Where a patentee claims, in a suit, damages for a reduction of his prices, caused by the defendant by infringing the patent, he must establish, by satisfactory evidence, not only that a reduction of his prices was caused by the infringement, but how much such reduction was, and how much of it was occasioned by the acts of the defendant, and how much was due to the fact that the infringing articles contained the invention patented. Such evidence must not be estimate, conjecture and opinion, but must be such as to afford a sound and safe basis of calculation.

Where a patentee claims, as damages, a loss of profits caused by a loss of sales, resulting from an infringement, he must establish, by satisfactory evidence, that he would have sold more of the patented articles than he did sell if the infringing articles had not been sold, and what profit he would have made on them, and what part of such profit is to be assigned to the invention patented. Such evidence must not be conjecture and speculation.

(Before BLATCHFORD, J., Southern District of New York, June 24th, 1878.)

BLATCHFORD, J. The master reports that the defendants realized, as profits from the sale of infringing cuspidores, at least \$300 in the first case, on 1,003, and at least \$275, in the second case, on 2,225, but, that he is unable, from the proofs, to report what amount of such profits to them is attributable to the distinctive patented feature of said cuspidores, "the

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business of the defendants being different from the complainants' in relation to these goods." The plaintiff does not except to this part of the report.

The plaintiff sold, during the same time, 90,554 of the patented cuspidores, for a sum less by \$10,325 84 than the sum for which they would have sold at rates which ruled prior to the commencement of the infringements. The master reports that such reduction in price was, to a great extent, occasioned by such infringements by the defendants and other parties; that the infringements by the defendants occasioned a loss to the plaintiff, by the compulsory reduction of his prices, of 30 per cent. of the \$10,325 84, being \$3,097 76; that such loss was occasioned by reason of the fact that the infringing articles contained the patented features of the plaintiff's patented cuspidores; and that one half of such 30 per cent. of loss was occasioned by each set of defendants. The master attributes 70 per cent. of the reduction of prices to causes other than the infringements by the defendants. He, therefore, reports against each set of defendants, damages for the above cause, amounting to \$1,548 88.

He also reports, that, if the defendants in the first case had not sold the 1,003 infringing cuspidores, the plaintiff would have sold 1,003 more of the patented cuspidores than he did sell, and would have made a profit, on each, of 79 cents, or, in all, \$792 37, and that 85 per cent. of this, or \$673 56, is the amount of such profit to be assigned to the distinctive patented feature of the cuspidores. He, therefore, reports that amount, \$673 56, as additional damages against the defendants in the first suit. The aggregate damages against them he reports at \$2,118 94. The figures add up \$2,222 44.

He also reports, that it is not made to appear, that, if the defendants in the second case had not sold the 2,225 infringing cuspidores, the plaintiff would have sold an equal number of the patented cuspidores to the persons who purchased from said defendants. He, therefore, reports against said defendants damages to the amount of \$1,545 48, which should be \$1,548 88.

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I think it was a correct conclusion that the zinc cuspidor, with the bottom loaded with iron filings, was an infringement of the patent. It was composed of three metallic parts, formed and combined substantially as set forth in the Heath patent, with the excess of weight in the base. Although the self-righting feature is found in the Topham patent, that patent does not show the combination covered by the Heath patent.

The question, whether the prices which the plaintiff received for his cuspidores was less than those which he would have received but for the infringements by the defendants, is a question of fact. Such, also, is the question as to the amount of the reduction, and as to how much of it was occasioned by the acts of the defendants, and as to how much of it was attributable to the fact that the infringing articles contained the patented feature of the plaintiff's patented cuspidores. Such, also, is the question as to whether, if the infringing cuspidores had not been sold, the plaintiff would have sold any greater number of the patented cuspidores than he did sell, and what profit he would have made on them, and what part of such profit is to be assigned to the distinctive patented feature of the cuspidores.

It is for the plaintiff to establish, by satisfactory evidence, not only that a reduction of his prices was caused by the infringements, but how much such reduction was, and how much of it was occasioned by the acts of the defendants, and how much was due to the fact that the infringing articles contained the patented feature of the plaintiff's patented cuspidores. I am not satisfied with the conclusions of the master on this subject. The evidence on which those conclusions were reached was in the shape of estimate and conjecture and opinion, and afforded no proper basis for a report of actual damages by a forced reduction of prices. The allotment of 30 per cent. of such reduction to the infringements by the defendants, and to the fact that the infringing articles contained the patented features of the plaintiff's patented cuspidores, and of 70 per cent. of such reduction to other causes, is founded only on the conjectures, estimates and assertions of witnesses,

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and not on any sound and safe basis of calculation. Moreover, it does not appear that the master at all considered the question as to the weight to be given to the fact that the sales of the plaintiff were unquestionably increased in number by the reduction of prices by him, resulting in profit on the added sales, and counterbalancing, to some extent, at least, diminution of profit on the rest of the sales.

So, also, it is for the plaintiff to establish, by satisfactory evidence, that he would have sold more of the patented cuspidores than he did sell, if the infringing cuspidores had not been sold, and what profit he would have made on them, and what part of such profit is to be assigned to the distinctive patented feature of the cuspidores. I see no proper foundation, in the evidence, for the conclusion, that, if the defendants in the first case had not sold the 1,003 infringing cuspidores, the plaintiff would have sold 1,003 more of the patented cuspidores than he did sell. The conclusion has no other basis than conjecture and speculation.

Only nominal damages should have been reported in each case. The plaintiff is entitled to recover costs other than the costs of the references before the master, and of the reports and exceptions, and of the hearings thereon, and the defendants are entitled to recover the costs of the references before the master, and of the reports and exceptions, and of the hearings thereon. The one set of costs, in each case, must be deducted from the other, and a decree be rendered for the difference, for the party in whose favor it shall exist.

Frederic H. Betts, for the plaintiff.

Benjamin F. Lee, William H. L. Lee and John H. Miller, for the defendants.

The Fanita.

THE FANITA.

In a collision between a steamer and a schooner, in the East river, between Brooklyn and New York, the steamer going down the river and the schooner up, the steamer was held in fault for attempting to pass too close to the schooner, between her and the New York shore, when there was plenty of room on the other side, and the steamer knew that the schooner was not crossing the river to the Brooklyn side, but was going up under the New York shore, to avoid the current.

The schooner was held in fault, because her lookout, although he saw the steamer's light, failed to report it to the man at the wheel as soon as he could and should have reported it.

(Before WAITE, Ch. J., Southern District of New York, June 27th, 1878.)

THIS was an appeal by the libellant from a decree of the District Court, (8 *Benedict*, 11,) dismissing the libel, in a suit *in rem*, in Admiralty.

Franklin A. Wilcox, for the libellant.

John E. Parsons, for the claimant.

WAITE, Ch. J. On August 20th, 1870, the libellant was the owner of the schooner Samuel G. Miles, bound on a voyage from Croton Landing, Hudson River, to Clott's brickyard, in Williamsburg, Long Island, nearly opposite Corlaers' Hook, New York, with a cargo of 42,000 brick, weighing about eighty-four tons. Her length was sixty-two feet keel, her breadth about twenty-three feet, and she was loaded almost to the water's edge. The schooner left Croton about four o'clock in the afternoon of that day. Her crew consisted of four men all told—one at the wheel, one on the lookout, one on deck, and the cook. After rounding the Battery, she laid her course up the East river, from one hundred to one hundred and fifty yards from the ends of the piers on the New York shore, and, at about nine o'clock in the evening, when off pier 10, was run into and sunk by the steamer Fanita. The wind at the time was from northwest to west-northwest, blowing about an eight knot breeze, and the tide was ebb. The schooner had

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her foresail, mainsail, topsail and jib all set, with the wind upon her port side, and the sails well off to starboard. Her deck load came well up to her booms, and the wheel was at her stern. The Fanita was a steam propeller, of 432 tons burthen, and 155 or 160 feet in length, engaged in regular trade between New York and Philadelphia. She backed out of her slip, between piers 33 and 34, East river, at 8.40 o'clock in the evening of that day, swung her bow down the river with the tide, while holding to the pier with a stern line, and started on her way out of the harbor. When she got straightened upon her course, she was between fifty and sixty feet from the ends of the piers. On her arrival opposite the pier of the East River Bridge, on the New York side, between piers 27 and 28, her master discovered a Fulton ferry-boat coming out of the slip between piers 21 and 22, and ported his wheel to go under her stern. To accomplish this, his course was changed from two to three points, and he passed the ferry-boat off the end of her slip, and not far from it. Before passing, however, the course of the Fanita was changed somewhat to port, and, when she got by, she was running upon her starboard wheel, heading a little toward the middle of the river. Soon after, and while she was on this course, a red light was discovered about half a point off her starboard bow, nearly ahead, and a little distance above the Battery. Upon examining it through the glass, the master of the Fanita, although no green light was seen, discovered that it was upon a schooner which was headed up stream, and, as he judged, keeping along the New York shore to avoid the current. When about half-way between the Fulton ferry slip and the Wall street ferry slip, which is between piers 15 and 16, the master of the Fanita gave orders to port her wheel, in order that she might go between the schooner and the New York shore. She was then about 150 yards from the ends of the piers, and there was nothing to prevent her keeping her course out into the river. Up to that time she had been running at slackened speed, but then the engine was hooked on and her speed increased. When the light of the schooner had been brought

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to bear somewhat over the port bow of the Fanita, she was straightened on a course which would have brought her in upon the piers before she reached the Battery, and not far above it. The man at the wheel of the schooner did not discover the steamer until his attention was called to her by the lookout a few seconds before the collision. The sails were so set as to make it impossible for him to see forward over the starboard side of his vessel. The lookout saw the white light of the steamer when it was supposed by him to be a quarter of a mile away, and off the starboard bow of the schooner. He gave no notice of this to the man at the wheel until the collision was imminent. The wind was baffling, and the schooner was steering by the wind and not by compass. The schooner held her course all the time until the two vessels were within 150 feet of each other, when she came up somewhat into the wind, though her sails were all the time full, and, before the steamer could change her course or slacken her speed, the collision occurred. The stem of the steamer struck the bluff of the starboard bow of the schooner, and cut into her as far as the forward hatch, on a line which, if extended, would have come out about ten feet from the stern on the port quarter. The schooner sank immediately, and the cook, who happened to be below at the time, was drowned.

While only a red light was seen upon the schooner from the Fanita, the master of the Fanita, who was watching the light through his glass, testifies, that, from the beginning, he judged the vessel was passing up under the shore, to keep out of the way of the current. When discovered, the light was a little off his starboard bow, and the course he was heading, on his way out of the harbor, would necessarily have carried him outside the schooner, and well clear of her. Knowing, as he did, that he was already crossing the course of the schooner, and must soon be entirely out of her way, it was bad judgment to cross back again and undertake to pass between her and the New York shore. Had he not known her course, the case would have been different, for the red light alone in view indicated that she might be crossing the river.

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But, even if this were otherwise, and he was right in changing his course, it is clear that he attempted to pass too close. The schooner kept steadily on her course until the two vessels were within 150 feet of each other, approaching from opposite directions, at a combined speed of at least twelve miles an hour. This is a conceded fact. It is apparent, therefore, that, with her sails full all the time, the schooner could not get much out of her course in going but little more than her length of sixty feet. The direction of the blow, also, shows the same thing. The steamer was headed toward the New York shore, so as to strike the piers somewhat above the Battery, and the collision was off pier 10, 100 or 150 yards from the shore. The line of the blow was from the bluff of the starboard bow to a point on the port quarter, ten feet forward of the stern. The course of the schooner, therefore, could not vary a great way from a line parallel with the piers. It was clearly a fault in the steamer to undertake to pass, at full speed, so close to the schooner, that a variation of a few feet from their course, by either of the vessels, would cause a collision.

The schooner was also in fault. Her lookout testifies that he saw the Fanita's light when it was a quarter of a mile away. He may have been mistaken in his judgment as to the distance, but it was some time before the collision. He neglected entirely to report to the man at the wheel until the very moment when the two vessels came together, although he knew, or ought to have known, that the light could not be seen from the wheel. This was a plain and palpable fault. It is as much the duty of a lookout to report what he sees to those who are to act upon his knowledge, as it is to watch. In this case, the schooner was required to keep steadily on her course. Had this light been reported to the man at the wheel, he might have prevented what little change of course there was in his vessel, by watching more carefully the effect of the baffling wind.

The damages should be equally divided between the two vessels, and a reference may be had to one of the Commissioners of this Court, to ascertain the amount.

The New York Rectifying Company v. The United States.

THE NEW YORK RECTIFYING COMPANY, PLAINTIFF IN ERROR

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

Under § 3319 of the Revised Statutes, if a rectifier purchases from an authorized distiller, who is not an authorized rectifier or an authorized wholesale liquor dealer, distilled spirits, in quantities greater than 20 gallons, which were not produced by such authorized distiller, such purchaser is liable to the penalty imposed by said § 3319.

(Before WAITE, Ch. J., Southern District of New York, June 27th, 1878.)

WAITE, Ch. J. Section 3319 of the Revised Statutes is as follows: "It shall not be lawful for any rectifier of distilled spirits, or wholesale or retail liquor dealer, to purchase or receive any distilled spirits, in quantities greater than twenty gallons, from any person other than an authorized rectifier of distilled spirits, distiller, or wholesale liquor dealer. Every person who violates this section shall forfeit and pay one thousand dollars: Provided," &c. The plaintiff in error, a rectifier of distilled spirits, contracted with Fleischman & Co., authorized distillers, for twenty-five barrels of highwines, to be delivered August 14th, 1873. On the day named Fleischman & Co. delivered fifteen barrels of their own manufacture, and announced their inability to deliver more. The full number being insisted upon, Fleischman & Co. delivered, and the plaintiff in error received, under the contract, the remaining ten barrels, stamped and marked in a manner to indicate that they had been made by some distiller other than Fleischman & Co. Fleischman & Co. were not authorized rectifiers, or authorized wholesale or retail liquor dealers. Upon this state of facts the District Court properly gave judgment against the plaintiff in error, for the penalty imposed by the section just quoted. A distiller is only authorized, by virtue of his occupation as a distiller, to sell spirits of his own production. Every person who sells spirits, except as a distiller properly

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may, is a wholesale or retail liquor dealer, according to the quantity he sells. (*Section 3244, Rev. Stat., par. 4.*) Fleischman & Co., in their sale and delivery of the ten barrels, acted as wholesale dealers and not as distillers. Not being authorized wholesale dealers, the plaintiff in error, a rectifier, was prohibited by the statute from receiving this delivery from them.

Judgment affirmed.

Thomas Harland, for the plaintiff in error.

Stewart L. Woodford, (*District Attorney*), for the defendants in error.

SAMUEL SINN AND OTHERS, PLAINTIFFS IN ERROR

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

S., through his agent, K., purchased, in England, unfinished goods, and, through K., had them dyed there by one man and made up by another. In each case S. paid the cost of the work. K. then invoiced the goods to S., at New York, at a price equal to the cost of purchase, dyeing and making up, with K.'s commissions added. Entry of the goods was made on such invoice, on the ordinary purchaser's oath, provided for by § 4 of the Act of March 1st, 1823, (3 *U. S. Stat. at Large*, 730,) (now § 2841 of the Revised Statutes.) The valuation in the invoice was below the fair market value: *Held*, that the invoice and the oath ought to have been such as the statute requires from a manufacturer.

(Before WAITE, Ch. J., Southern District of New York, July 1st, 1878.)

WAITE, Ch. J. Section 2841 of the Revised Statutes, which was in force when the seizure in this case was made, as section 4 of the Act of March 1st, 1823, (3 *U. S. Stat. at Large*, 730.) provides, that, whenever merchandise imported into the United States is entered by invoice, one of three pre-

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scribed oaths, according to the nature of the case, shall be administered by the collector of the port, at the time of the entry, to the owner, importer, consignee, or agent. The first is the oath of a consignee, importer, or agent; the second, that of an owner, in cases where merchandise has been actually purchased; and the third, that of a manufacturer, or owner, in cases where merchandise has not been actually purchased. The last oath applies to all cases where the merchandise had not been purchased by the owner, or his agent, in the ordinary mode of bargain and sale. The oath, when goods had been actually purchased, was to the effect, that the invoice produced contained a just and faithful account of the actual cost of the goods, * * * of all charges thereon, "including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing," &c., while that when the goods had not been actually purchased was, that the invoice contained "a just and faithful valuation of the same, at their fair market value, including charges of purchasing, carriages," &c., (as in the other case.) On the arrival in New York of the goods now in question, they were entered by the claimants by invoice, and the ordinary purchaser's oath was taken. They were seized under the customs laws, as forfeited to the United States, and the information alleges, as cause of forfeiture: (1) That they were not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties, &c. (2.) That the "invoice was made up with intent, by a false valuation, to evade and defraud the revenue, in this, that the goods, &c., mentioned therein, being subject to an *ad valorem* duty, and obtained by purchase, were falsely valued in the invoice, and were charged therein at a less price than the actual cost thereof," &c. (3.) That the invoice was also made up with like intent, in this, that the goods, &c., mentioned therein, having been obtained otherwise than by purchase, were falsely valued in said invoice, and were charged therein at a less price than the actual market value thereof at the time and place when and where the same were procured or manufactured, &c.

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The case was tried before § 16 of the Act of June 22d, 1874, (18 *U. S. Stat. at Large*, 189,) came into effect, which made actual intention to defraud an essential question in suits to enforce forfeitures under the customs laws. Upon the trial, the evidence introduced by the claimants showed, that the claimants, through their agent, M. Kaufman, purchased the goods, at Bradford, England, in an unfinished state, known to dealers as "in the grey." They then, through the same agent, had them dyed by one man and made up by another, in each case paying the cost of the work. Kaufman then invoiced the goods to them at a price equal to the cost of purchase, dyeing and making up, with his commissions added. The entry was made upon this invoice. Testimony was offered by the Government, clearly showing that the valuation in the invoice was below the fair market value. At the close of the testimony, the claimants asked the Court to instruct the jury to find in their favor. This was refused, and the Court did charge, that the question for the jury "to determine was, whether the actual cost of the goods was correctly stated in the invoices; that, if they did not believe, from the testimony, that the claimants made a *bona fide* purchase of the said goods from M. Kaufman, at the prices testified to, then the Government was entitled to a verdict; that, if the claimants purchased the goods in the grey, and had them dyed at their own expense, and put up at their own expense, and did not buy them in a finished state, they were, in law, manufacturers, and not purchasers; that, in such event, the invoices should have stated the actual market value; and that there was no pretence that said invoices stated the actual market value." To this charge and refusal to charge exception was taken. A verdict having been rendered against the claimants, and judgment duly entered thereon, the case is here upon error. The errors assigned are, (1.) That the Court refused to charge the jury to bring in a verdict for the claimants. (2.) That the Court charged, that, if the claimants purchased the goods in the grey, and had them dyed at their own expense and put up at their own expense, and did not buy them in a finished state, they were, in

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law, manufacturers and not purchasers. (3.) That the Court charged, that there was no pretence that said invoices stated the actual market value.

Clearly, the claimants did not buy the goods "in the ordinary mode of bargain and sale." Kaufman was their agent to buy the unfinished article and have it dyed and made up. When he invoiced the goods, it was not as a sale, but as a statement of the result of his agency in purchasing the goods and causing them to be manufactured. The goods, when imported, were not in the same condition as when bought. Their value had been materially increased by what had been done by the manufacturers. For the purposes of entry, this increase is not to be measured by its cost, but by its effect upon the price of the article in the market.

The claimants are in no better condition than they would be if they had themselves bought the unfinished article in Bradford, and procured personally to be done just what Kaufman did. He was their agent, and his acts were their acts. The case is in no different position from what it would have been if the dyer or the finisher had made the original purchase, and had, by his own labor and skill, completed the work to be done. In such a case it could not seriously be claimed that he might enter the goods upon an invoice which fixed the valuation at the actual cost to himself, if that cost was below the actual market value of the finished article at the time.

It seems to be clear, therefore, that the invoice to be furnished, and the oath to be taken, were such as the law requires from the manufacturer. By section 2864 of the Revised Statutes, a re-enactment of section 1 of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 738,) if any owner, &c., of merchandise, knowingly makes an entry thereof by means of a false invoice, "or of any invoice which does not contain a true statement of all the particulars" by law required, the merchandise is subject to forfeiture. Every importer is presumed to know the law under which he makes his importations. In contemplation of law, therefore, when he makes an entry upon an invoice which does not state truly what the law re-

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quires, he knowingly does it. At the time of this seizure and trial, no question of *actual* fraudulent intent need be considered. Knowledge, actual or presumptive, was all that the Courts need inquire into. If the forfeiture was incurred without wilful negligence, or any intention to defraud on the part of the owner, a remission of the forfeiture, or a restoration of the proceeds of the sale, might be obtained on timely application to the Secretary of the Treasury. (Section 5292 of the Revised Statutes, and the several statutes from which that section was taken.) In this condition of the law the charge as given was undoubtedly correct. If there was no wilful negligence in the case, or actual intention to defraud, the Secretary of the Treasury alone has power to relieve from the consequences of the apparent violation of the law.

This makes it unnecessary to consider the first assignment of error. As to the third, it is sufficient to say, that, if there was, in fact, a pretence that the goods were invoiced at their market value, the preponderance of testimony is so decidedly the other way, that the judgment ought not to be reversed on that account. The testimony is all set forth in the bill of exceptions, and, if this part of the charge had not been given, and a verdict had been rendered in favor of the claimants, the Court should promptly have set it aside. Under such circumstances, the judgment ought not to be reversed, even though, in fact, it was insisted that the evidence justified a contrary conclusion.

The judgment is affirmed.

Sigismund Kaufmann, for the plaintiffs in error.

Sutherland Tenney, (*Assistant District Attorney*), for the defendants in error.

APPENDIX.

I.

PROCEEDINGS OF THE MEMBERS OF THE BAR IN THE CITY OF NEW YORK, ON THE DEATH OF THE HONORABLE ALEX- ANDER S. JOHNSON, CIRCUIT JUDGE OF THE SECOND CIRCUIT.

THE Members of the Bar in the City of New York met in the United States Circuit Court Room, on February 5th, 1878, in pursuance of a call numerously signed, to take action with reference to the death of the Honorable ALEXANDER S. JOHNSON, Circuit Judge of the Second Judicial Circuit of the United States.

The meeting was called to order by Hon. Henry E. Davies, who said: I have been requested by a number of members of the Bar to propose, as Chairman of this meeting, the Hon. Samuel Blatchford. Judge Blatchford was unanimously elected President of the meeting.

Mr. Davies then said: I have also been requested to propose, as Vice-Presidents of this meeting, the Hon. Charles L. Benedict, Hon. Nathaniel Shipman, Hon. William J. Wallace, Hon. Hoyt H. Wheeler, Hon. Noah Davis, Hon. William E. Curtis and Hon. Charles P. Daly; as Secretaries, Hon. Stewart L. Woodford, John I. Davenport, Esq., and George F. Betts, Esq. The gentlemen named were elected unanimously.

The officers having taken their seats, William Allen Butler, Esq., spoke as follows:

Mr. Chairman,—I have been requested by the Committee having charge of the arrangements for this meeting, to present Resolutions expressive of the sen-

timents of the Bar of New York in reference to the occasion which has led to this meeting.

There are present, Mr. Chairman, eminent members of our Bar who were associates of Judge JOHNSON during his career as a lawyer, and others who were his associates upon the Bench of the highest Court of our State; and from these gentlemen we shall no doubt hear, in fitting terms, in reference to the character, the attainments and the public service of Judge JOHNSON, which, necessarily, are only briefly alluded to in the Resolutions which I shall have the honor to present.

If I am permitted a single word of preface, I will take leave to say that a gathering like this seems to me to afford a very striking illustration of the community of interest—I might say the identity of interest—between the members of the Bench and of the Bar, as co-workers in the same sphere of duty.

It is more than a quarter of a century since Judge JOHNSON left the active practice of the profession here in New York, to take his place as one of the Judges of the Court of Appeals, as then constituted. And yet, during all the interval of time since he left us, until now that we meet to pay this tribute to his memory and to his public services, we have always claimed him as a member of this Bar. We have seemed to be identified with him in the many occasions when it was our duty and his to act together in reference to great and important questions relating to commercial law, and to all the other interests which are so frequently involved in the discussions of the profession and in the decisions of the Courts; so that we have been still his associates. We have been before him as advocates, and have had the opportunity of witnessing the impartiality, the candor, the learning, the integrity which he brought to the discharge of his official duties; and we have also felt that there never was any interruption of that kindly feeling which to so large a degree existed towards him on the part of all the members of the profession who were brought into contact with him when he was one of us, and which was continued on his part during his long judicial service.

When we last saw him presiding in the Circuit Court a few weeks since, it was painfully apparent that he was yielding to the burden unwisely devolved upon a single Judge, which he had only too willingly assumed, and under which he struggled to the utmost of his ability, in a manner which entitles us to say that his effort to sustain it was heroic. In the circumstances of his death we find abundant occasion for regret; but he has left us an example of untiring devotion to duty; and as we now, standing beside his bier, look back over this honorable and finished career, I think we may all take from it a high incentive to that continuance in patient, thorough and effective service which, alike for the humblest as the highest toiler in our ranks, is its own satisfaction and reward. By your leave, Mr. Chairman, I will now offer the following Resolutions:

“The Members of the Bar of the City of New York, convened to take action in reference to the death of the Honorable ALEXANDER S. JOHNSON, late Circuit Judge of the United States, for the Second Judicial Circuit, hereby resolve as follows:

Resolved, That we have learned with profound regret of the death of Judge JOHNSON, which deprives the Bar of this City and State, and of the Circuit of

which he was the honored judicial head, of a wise and able Judge and an upright man, eminent in the public service, and justly held in the highest esteem in all the relations of life.

Resolved, That in the professional career of Judge Johnson, and in the various public positions filled by him—as a Judge of the Court of Appeals, to which he was elected in 1851 for the full term of eight years; as a Commissioner under the Treaty of July 1st, 1868, with Great Britain; as a Member of the Commission of Appeals, to which he was appointed in January, 1873; as a Judge of the present Court of Appeals, from December, 1873, to January 1, 1875; and in the Federal Judiciary, as Circuit Judge of the Second Judicial Circuit, from October, 1875, to the date of his death—the discharge of his high functions was marked by a constant and undeviating devotion to duty, by high intellectual ability and by absolute rectitude of purpose.

In the retrospect of his public life we recall these conspicuous traits of his character, and of his judicial action, alike in justice to his memory, and in grateful recollection of his services to his State and country. Thoroughly grounded and versed in the science of the law, and with a large experience in its practice, it was his endeavor, as a jurist, to apply those well established principles, which are the basis of the due administration of justice, so as to reach in each particular case a conclusion resting upon their sure foundations. This characteristic of his mind eminently fitted him for the duties of the Bench of an Appellate Court, and is amply illustrated in his reported opinions, which are distinguished for clear and lucid expositions of legal principles, and their close and discriminating application to the most intricate and important questions of law and fact.

While the reports of our highest State Court abundantly attest the fulness of his learning, the breadth of his intellect and his ceaseless industry, the rare personal qualities which gave a peculiar charm to his character, evinced in the unvarying urbanity and patience, the genial courtesy and self-control, the cordial sympathy, without bias and interest, without partiality, which with him were inseparable from the discharge of duty, will be specially cherished by his associates and contemporaries, and should be perpetuated in this testimonial to his worth.

Our sorrow at the termination of his useful and honorable life, heightened by the consciousness that it was hastened by the undue pressure of judicial labors and responsibilities against which he struggled with self-sacrificing toil, finds a solace in the reflection, that, to the last, he was an example of fidelity to duty, and that, as a minister of justice, he died in the service she imposed.

Resolved, That a copy of these Resolutions, attested by the officers of this meeting, be presented to the Circuit Court of the United States in this District, and to the Court of Appeals of this State, in such manner as shall be directed by the chairman, for entry on their minutes, and that a copy be also transmitted to the family of Judge Johnson."

Hon. George F. Comstock spoke as follows:

I beg to second the Resolutions which have been read. The attention of the Bar, of the Bench and the Public has been arrested by the sad event which is the occasion of this meeting. We are met together as members of a common

profession, to give expression to the sense of the loss which we feel in the death of ALEXANDER S. JOHNSON. That event was unexpected to us; indeed, the intelligence of it came upon us with a startling suddenness. It is very well known that some two or three months ago his health had been giving way under the accumulated labors imposed upon him by the high judicial position which he so honorably and so usefully filled. It is also known, that, now only a short time ago, he went to the Island of Nassau for the benefit of its mild and genial climate, in the hope and expectation, in which we shared, that his health would be restored, and his usefulness continued. The first news we hear from him is the sudden and sad announcement of his death.

Judge JOHNSON was eminent as a lawyer, a jurist and a citizen. I had the rare good fortune to know him, I think I may say intimately, during nearly the last twenty five years of his life; and it is to me a source of profound satisfaction to believe that I enjoyed his friendship, as I gave him, most unreservedly, my own. The impression made upon me by his talents and learning, by the purity of his life, by his genial nature and the graces of his character, are with me a recollection which will remain as long as memory lasts.

His career at the Bar was comparatively a brief one, and mainly, if not wholly, in the City of New York. I was never a witness of that career, but it must have been one of laborious study and practice, for it made him one of the most accomplished lawyers that I have ever known. At an unusually early age for elevation to the Bench, the display of his learning and powers in the highest Court of the State attracted to him the attention of the profession generally, and their appreciation of his rare qualities was exhibited by his nomination and election to that tribunal. He became a Judge of the Court of Appeals at an earlier age than any other person upon whom that distinguished honor had been conferred; nor has it happened more than once, if at all, since that time. During the succeeding eight years of his life, and while, according to ordinary experience, he had scarcely reached the full maturity of his powers, he served in that capacity, and, as the whole profession witnesses, served eminently and usefully. At the expiration of that period the mutations of politics, the shortness of judicial terms, and the elective system, deprived the State for a considerable number of years of his services in a judicial capacity. Retiring from the Bench, he became a resident again in his native City of Utica. The well earned reputation which he enjoyed for learning, ability, perfect independence and impartiality, marked him for selection as the voluntary judge or arbiter in cases of private submission to him by the parties. I happen to know very well that he became the standing referee of the interior of the State in many cases of unusual importance, submitted to him by the parties with the same confidence in his learning and in his judgment which they would have in the decisions of Courts of the highest authority. The creation of the Commission of Appeals restored him to judicial life. He held a seat in that high tribunal by appointment, but for only about one year, when he was transferred, also by appointment, once more, to the Court of Appeals, to fill a place made vacant by the tragic death of Judge Peckham, who was buried in the ocean by the sinking of the steamer *Ville du Havre*. At the expiration, or soon after the expiration, of that official term, Judge JOHNSON received, now about three years ago, from the President

and Senate of the United States, an appointment to the distinguished position of Judge of this Circuit, by far the most important of the Circuits into which our Federal Jurisprudence is divided. He held that office to the close of his life, and we believe that he sank beneath the crushing weight of the labors which it imposed upon him. And in this connection I ought to mention the fact (which is contrary, I believe, to a received impression) that, when he ceased from his labors, prior to the October term, he had almost entirely cleared his docket of cases argued.

During a considerable portion of Judge JOHNSON'S judicial career, it happened to me to be associated with him. With him were also associated DENIO and SELDEN, names which are high on the roll of judicial fame. The relation to him to which I refer enables me, I think, to form a just judgment of his rare and excellent qualities as a lawyer and a jurist. I have nothing to say of his mental peculiarities; for he had no peculiarities or eccentricities of mind. His mind was simple, direct and strong. If any quality or sentiment belonging to him as a Judge was in predominance, it was his prevailing and pervading love of justice and of right, as ascertained by sound and beneficent rules of law. I think his purely intellectual faculties had their highest exercise in the quick and ready appreciation of the facts of a case in their true relation to the principles of law. He, more rarely than others, mistook mere resemblance in circumstances for analogy in principle. Few, if any, of his contemporaries had a more varied and extensive knowledge of the law. None had a more discriminative judgment. He had the rare common sense which looked through the false, and took in the true relations of a controversy; but it was a common sense cultivated and adorned by the learning of the books.

The duty of impartiality in a Judge is so plain that it is only feeble praise to say of a Judge that he is impartial. But I think I can truly say of Judge JOHNSON, that his was the most absolutely impartial mind that I ever knew. The parties to a controversy were to him a mere abstraction. He looked always directly at the merits of a controversy without any distracting thought or wish. To me he seemed always to be inaccessible even to the subtlest of those influences which sometimes, it must be confessed, are a disturbing weight in the even balances of justice.

The judicial opinions which he has left will be an enduring record. They will long be read and appreciated as models of neatness, simplicity and precision. Their characteristic and their charm is the utter absence of ambitious ornament and display. They are truly the reflex of that modest and unassuming character which distinguished him in all the relations of life. He was wholly free from vanity or self assertion. If he had pride, it was only the pride which lifted him above all meanness and wrong.

Such as I have most feebly portrayed him, was our deceased friend and brother. We shall see him no more, but his eminent and honorable career in the public service, illumined, as it was, by the radiance of his private virtues, will long be to us a memory to cherish, and an example of inestimable value. Our holy religion tells us to believe that he has exchanged earthly toil for eternal rest.

Hon. E. C. Benedict then said :

Mr. Chairman,—Although I knew Judge JOHNSON during all the time that he was at the Bar in this city, and subsequently on the Bench—I may say that I knew him very well, personally and familiarly, though not intimately—I do not rise to say anything with regard to his professional and judicial career, except that from the heart I shall vote for the Resolutions which have been read, and that I concur in the very excellent remarks which have been made by Judge Comstock and Mr. Butler. I shall say only a word or two with regard to Judge JOHNSON in another aspect of his public and personal life.

I had the honor to be associated with him during all the time that he was one of the Regents of the University of the State of New York, and although the duties of that office are unostentatious, they are highly useful and important to the State. It is not always that gentlemen who follow the law with so much earnestness, so much zeal and so much real love for its principles, find time to step aside into the more graceful pursuits of literature and science. Judge JOHNSON came into the Board of Regents fully sensible of the importance of its duties; and he brought to their exercise not only that wisdom, acuteness and impartiality which characterized him as a lawyer and a judge, but the love of letters, also, and generous learning with which he was deeply imbued. He came into the Board as the successor of the late eminent Rev. Dr. Campbell, of Albany, who decorated the metaphysical theology and earnest and devout faith of one of the strictest sects of our religion with the generous and refining influences of secular learning. Judge JOHNSON was immediately made the successor to Dr. Campbell on the Committees on the State Library and on the State Cabinet of Natural History.

The State Library was at that time, or a little before, put into the hands of the Regents as trustees, to manage and care for it. They found it a library of some ten thousand volumes, with many broken sets and shattered bindings, carelessly kept and carelessly used. They have made it, to-day, one of the best, and best conditioned libraries in the country, containing more than a hundred thousand volumes. On that committee Judge JOHNSON'S bibliographical knowledge, exquisite taste and great culture in books were made exceedingly useful in filling the gaps in the library, in adding to its stores, and in making it what it should be—a permanent and useful library in all departments of learning and literature.

His position on the committee on the State Cabinet was no less agreeable to him. Mr. Agassiz once said in my hearing, on a great public occasion, that the first question of a man of science in New York was, "which is the way to Albany?"—the home of that great Cabinet and of Professor Hall, the Geologist and Paleontologist of the most world-wide reputation, who is the curator of the Cabinet. One of merely professional tastes might be long acquainted with Judge JOHNSON without finding out that natural history might have been all in all his study, so quietly did he indulge in the charm of those studies. He knew enough of them all to be even more than merely intelligent in their literature and science. He was himself a careful observer of objects, especially with the microscope, and he was a general reader of the literature of those subjects. He knew not only the theories that are now fresh, but also those that were fresh

and believed in by everybody and exploded before he was born. His occasional hours, therefore, with his committee and with Professor Hall in the Cabinet, were among the luxuries of his life. He exhibited the same qualities as a member of those committees and as an individual associate of the members of the Board and in its meetings, which he exhibited on the Bench and at the Bar, and in social life, and which have been alluded to with such just feeling and truth by Judge Comstock and Mr. Butler; the same personal amenity, the same cheerfulness and the same quiet and unostentatious way of doing his duty under all circumstances. He left the Board of Regents by resignation, because the judicial appointment which he had received rendered him, as he thought, incompetent to hold the two offices; otherwise, as he often said to me, he would have been glad to continue in the Board, and lamented that he could not be with us at our meetings and participate in our duties as he had formerly done.

Although the office of Regent is one of much labor, no pay, and little glory, still it is well to tell of such a man as Judge JOHNSON, that he considered usefulness as the best pay and the truest honor, and that he fulfilled all the duties of that non-professional and unsalaried office, with the same ability and faithfulness, and the same personal loveliness (if I may use such an expression) that he did the more distinguished public offices which he filled.

Edgar S. Van Winkle, Esq., said:

Mr. Chairman, and Gentlemen of the Bar—After the very expressive and eloquent Resolutions, and after the just and extended remarks of the gentlemen who have spoken in regard to Judge JOHNSON's accomplishments and character, I shall not attempt to detain you by any repetition of the views which have been so well put before you; for in attempting to do so I should only display my own inferiority. Having been requested to make some remarks at this meeting, I have consented to do so; but, holding the same views as those gentlemen by whom the just character of Judge JOHNSON has been so well and so particularly set forth, it would seem that there was but little left for me to say; and there is but little, except generalities.

The custom we have, Bench and Bar, of meeting as one body on the death of any distinguished member of our profession, whose character we have revered and whose talents we have esteemed, is a beautiful custom, I think; one which tends to keep alive in our hearts a feeling of affinity with one another, a feeling that our connection with our departed friends does not cease entirely on their death, and that in our memories their talents and their virtues are embalmed, and that they serve as an incentive to us to endeavor to follow in their footsteps. And more particularly when a prominent occupant of the Bench, one who has worthily and successfully for a long period of time fulfilled the difficult duties and functions of that position departs, it seems more than ever proper that we should meet again together, the Bench and the Bar, and repeat in such meeting our estimate of the character of our departed brother. A Judge in any part of this Circuit, the territory embraced by this Circuit of the United States Court, has anything but a sinecure. We know and we see that in all the Superior Courts a Judge has a burden upon him which few constitutions, mental or physical, can bear. And I often admire the courage which enables men who know what is awaiting them in a short time, to assume the burdens of

such an office as this. Therefore, my friends, we should rally to the support of the custom, and speak a good word in behalf of every one of those gentlemen, those martyrs, who, having worthily fulfilled the office of Judge, have then passed away.

When, unexpectedly to me, I was requested to take a part in these observances, I felt inclined to refuse; but, upon consideration, it seemed to me I had no right to do so. And, moreover, I feel towards the worthy members of our profession that degree of respect and affection, I may say, that I would not refuse to contribute what little I could, however inconsiderable it might be, to the preservation of the custom which we have adopted in this country, and which we are now carrying out; and I feel a share of that loyalty which impels and justifies even the meanest clansman in casting his mite, however slight it may be, upon the cairn of a fallen chieftain. And the Judge whom we lament was a chieftain; he was a great Judge; he had those qualities which belong more especially, in their influence and fitness, to the judicial office. He had honesty, he had industry, he had intelligence, he had learning, he had fearlessness, he had firmness, and he had a love for the duties he was called to perform. As to his learning, the decisions with which our books are filled bear testimony. It needs no further remarks on my part. I can add nothing to what has been so well said here to-day by gentlemen well able to speak of the value of those decisions, and to judge of the learning which they embalm. That he was industrious, I think cannot be doubted, apart from the asseverations of his friends to-day; because I am persuaded, from what I have seen, that a person who filled the judicial offices which he did—and more especially in this Circuit—without industry could not with honor have survived a single Term, so great and important were the interests before him, so pressing the necessity for decision.

It is hardly necessary to extend the catalogue of qualities which I have named as those which constitute a great judge. As to the integrity and impartiality of Judge JOHNSON, I never heard the slightest impeachment of it; nor do I believe but that the persons the most inimical to Judge JOHNSON (for even the best men have their enemies) would abstain from making such a charge as that. If we look at his decisions, if we read them carefully, we shall see that, though he was a man, as we are, and subject to all the infirmities of human nature, yet when he entered the judicial office he became removed, as it were, from those infirmities. And you perceive all through his decisions, whatever they may be, that in his mind there stood, over and above all, the figure of Justice with the flaming sword that would not permit anything unworthy to enter the sanctuary of his mind. There can be but few subjects more worthy of our consideration than that of a member of the profession who has reached the highest attainable honors it offers at the Bar, and eminent judicial honor on the Bench—I say there can be few subjects of contemplation pleasanter to the legal mind than that of such a man, subject to all the infirmities of nature, subject to all the influences that cunning or ability could spread around him, subject to be misunderstood and misrepresented, and yet who, by force of his inward contemplations and his own respect for virtue and right, has lifted himself above the fogs and tempests of the world, to a serene height, where he can look down upon the follies and weaknesses of the world as one who has passed through and over them, and can, from his elevation, announce the decrees with which law and equity, the twin

offsprings of justice, inspire him. Well and ably did he fulfil all his functions ; and I trust that all here are united in one feeling, that in renewing our friendship for each other we at once strengthen the bond which binds the Bar and Bench together, and raise a tribute of affection to the memory of our friend, and of admiration for his many virtues.

Luther R. Marsh, Esq., spoke as follows :

Mr. Chairman, and Gentlemen—An early acquaintance with Judge JOHNSON, ere he came to the Bar, and since continued, may give me warrant, perhaps, for a single word. Were I to state my thoughts in a condensed form, I should but re-word the Resolutions. They express, I am persuaded, the sentiment of the Bar—of the Bar of this City and of the Bar of the State—at this sad bereavement. He, to honor whose memory we have met, received an inheritance from his country which he was proud to maintain. His mother was the daughter of the second son of President John Adams. As early as 1797—ere Utica had received the christening of its present name—while yet it was known only as “Old Fort Schuyler,”—his grandfather, Bryan Johnson, was a prominent and valued citizen, and contributed largely to the impulse the infant received in growth and prosperity. Concurrent with the present century, from the beginning down to a recent date, his father, Alexander B. Johnson, was one of the foremost men of Utica, in commerce, in influence, in finance, in literature. And so it happened that the departed Jurist came to his profession through a youth and education of uncommon advantage. All that could be done by affluence, by social position, by opportunity, by appliance, by stimulus to effort, was his ; and these advantages fell not on unfruitful ground. He had an intuitive apprehension, a great intellectual capacity, and was quick to appropriate and assimilate the benefits that I have mentioned. He took delight in scientific research, and was a man of general culture and scholarly attainments. Not content with surface views, he liked to think out principles to their last analysis. He was peculiarly well fitted, as I think, for success at the Bar, for forensic debate, and for the presentation and argument of the principles that obtain in the administration of Justice. He was endowed with a sweet and magnetic voice, and a most winning manner.

But he was not to stay in the arena long. The Bench was his destiny. It was there that the largest portion of his business life was spent, in the manner narrated by the Resolutions and by the gentlemen who have preceded me—in the exercise of the Godlike prerogative of applying the principles of law to the rights of men. That he performed this duty with inflexible integrity and rare ability, in recorded opinions which stand as landmarks in the troubled sea of controversy, and to the acceptance of all, is conceded by all. I have often thought, sir, that if fortune had given him a seat on the Bench of the Supreme Court of the United States, at Washington, he would have been most admirably adapted for the wider range of that majestic tribunal, before which come, for adjudication, the conflicting interests of the whole country, and whose voice is authoritative to its utmost bounds.

Sir, I have noticed, by the newspapers, that the Bar of Utica, in his own native County of Oneida, are meeting to testify a similar honor to that which we render to his memory to-day. The city of Utica, as the city of New York,

claims him as her own. That city, sir, has done credit to her position as the geographical centre of the State, by making it, from early time, the legal centre as well. She has produced the ablest lawyer, as such, whom our State, and, as I think, our country, has seen—Samuel A. Talcott. His scarcely less famous partner, William H. Maynard, has sent down to us a reputation for transcendent ability as a lawyer, and fabulous powers of memory. Since that time she counts, among her ornaments, Greene C. Bronson, Henry R. Storrs, Joseph Kirkland, Joshua A. Spencer, Samuel Beardsley, Hiram Denio, and William Curtis Noyes. She has furnished for our State, in succession, three Attorney-Generals—Talcott, Bronson, and Beardsley. At the time of the death of the eminent Jurist whom we mourn, she filled two seats on the Bench of the highest Courts of the United States: one in the Circuit Court, which his lamented death leaves vacant, and one on the Supreme Bench at Washington. And even now, at this very hour, the Senatorial representation of the great State of New York is filled by her two citizens, Roscoe Conkling and Francis Kernan. Utica, so highly favored, now enrolls, with pride, while yet in sorrow, the name of ALEXANDER S. JOHNSON on the bright scroll of her departed sons. We, of New York, claim him too; and there, as here, the Bench and Bar, laying this tribute on his tomb, in a common sympathy mourn their loss, and hold his memory in honor.

Calvin G. Child, Esq., then said :

Mr. Chairman, and Gentlemen—I have heard the Resolutions read, and although a stranger to most of you, I desire simply to express, in common with you of the New York Bar, the sentiment which we of Connecticut, being so closely allied with you in the Second Circuit, feel upon the occasion which has called you together. The pressure of the judicial duties of Judge JOHNSON has kept him out of our State almost entirely, except in the matter of appeals. His predecessor, although a native of Connecticut, came to the Bench of this Circuit with a reputation acquired in your State. We knew him whom you mourn to-day by a like judicial reputation: and I could not keep silent, sir, with these proceedings before me, without taking advantage of the opportunity to express our sympathy, and our participation in these ceremonies to-day, and the respect we all feel for the Judge who has been loaned to us by the State of New York. There is an old Japanese custom, sir, that when the body of the dead passes, each neighbor shall carry it for a short distance, as a neighborly duty which they owe to the memory of him who has gone; and in that spirit, on behalf of the Bar of Connecticut, I would to-day with you stand around the bier of ALEXANDER S. JOHNSON, and speak for our Bar the sentiments that we have of respect for his memory, his judicial talents and his judicial integrity.

The Resolutions were adopted unanimously.

The President, in accordance with the Resolutions, appointed Mr. Benjamin D. Silliman and Mr. William Allen Butler a Committee to present the Resolutions to the Court of Appeals of this State and the Circuit Court of the United States for the Southern District of New York,

II.

RULES.

Rules of the Circuit Court of the United States for the Southern District of New York, adopted since the publication of the thirteenth volume of these Reports.

MAY 18th, 1878.

The Rule adopted by the Circuit Court of the United States for the Southern District of New York, to take effect July 1st, 1876, is hereby amended so as to read as follows :

“The cases and points, and all other papers furnished to the Court in calendar causes, other than causes for trial before a jury and reviews in bankruptcy, shall be printed, unless, by special order of the Court obtained eight days before the hearing, such printing or some part thereof shall be dispensed with. The appellant in appeals, the plaintiff in error in writs of error, the excepting party in exceptions to master's reports, and the moving party, on motions for a new trial and the argument of demurrers, shall cause the papers to be printed, and such papers shall include all the papers necessary for the proper presentation of the case on both sides. In all other cases, each party shall cause to be printed the pleadings, proofs and papers filed on his behalf. At the beginning of the argument each party shall furnish to his adversary three copies of his printed points, and, at least eight days before the argument, three printed copies of all other papers shall be furnished by the party printing the same to the adverse party. A party recovering costs shall be allowed his disbursements for the printing required of him by this rule.”

JUNE 15th, 1878.

No warrant of arrest shall be issued by a Commissioner of the Circuit Court, in a criminal case, unless such warrant is applied for by the District Attorney, or by one of his regularly appointed assistants, in person, or by the authority of such District Attorney or assistant, produced in writing to the Commissioner. No account of any Commissioner for issuing a warrant in any other case will be approved by a judge; and every account shall be accompanied by an affidavit of the Commissioner, showing by whom each warrant was applied for, and on what authority. This order shall not apply to extradition cases.

SEPTEMBER 2d, 1878.

The appellate docket shall consist of five divisions: (1.) Appeals in Admiralty; (2.) Writs of Error; (3.) Appeals in equity cases; (4.) Appeals in bankruptcy; (5.) Reviews in bankruptcy.

The docket of original causes shall consist of four divisions: (1.) Equity

cases, embracing pleas, demurrers, cases to be heard on pleadings and proofs, and cases to be heard on pleadings alone; (2.) Issues of law, in suits at law, upon the pleadings or upon special verdict; (3.) Issues of fact triable by a jury, between private parties; (4.) Issues of fact triable by a jury, to which the United States is a party, including customs and revenue suits against collectors.

For each division of the appellate docket, and for each division of the docket of original causes, there shall be a separate permanent calendar, the first of which shall be made up for the October Term in the year 1878, and shall continue to be the permanent calendar, subject to the addition to it of new cases, until the Court shall order a new permanent calendar to be made. The causes remaining on each permanent calendar shall be renumbered for every October Term.

In each division of the appellate calendar the causes shall, originally and at every renumbering, be arranged and numbered thereon according to the priority of the filing of the return in this Court. Pleas and demurrers in equity cases, set down by order for hearing, shall be numbered on the calendar as of the date of such order. Pleas replied to, and cases to be heard on pleadings and proofs, and cases to be heard on pleadings alone, as of the time of filing the last pleading. Issues of law, in suits at law, upon the pleadings, as of the date of the issue. Special verdicts, as of their date. Issues of fact triable by a jury, as of the date of the issue. The note of issue filed with the clerk shall specify the proper date.

Motions for a new trial, on cases or exceptions, shall not be put on any calendar, but must be made before the judge who tried the cause, at such time and place as he may direct.

Only one note of issue to the clerk and one notice of trial or hearing to the opposite party shall be necessary for any permanent calendar. The cause will then remain and stand for hearing or trial, until it is reached and called, when it may be moved by either party. If it be passed upon the regular call, no postponement being granted by the Court, it will go to the foot of the calendar. If it be a second time thus passed, it will be marked off the calendar. It may afterwards be renoticed and a new note of issue filed, stating the date at which it was last passed, as of which date it may again be placed on the calendar.

OCTOBER 11th, 1878.

In pursuance of the provisions of section 915 of an Act entitled, "An Act to revise and consolidate the Statutes of the United States in force on the first day of December, Anno Domini one thousand eight hundred and seventy-three," approved June 22d, 1874, it is ordered, that the provisions of the Act of the Legislature of the State of New York, entitled, "An Act relating to Courts, officers of justice and civil proceedings," passed June 2d, 1876, and the provisions of any Act heretofore passed by said Legislature amending said last named Act, so far as such provisions relate to a remedy by attachment against the property of a defendant, are hereby adopted by this Court as rules of this Court in respect to a remedy by attachment against the property of a defendant in a common law cause in this Court.

Rules of the Circuit Court of the United States for the Northern District of New York, adopted since the publication of the thirteenth volume of these Reports.

MARCH 21st, 1877.

All pleadings filed, served or for the use of the Court shall be folioed, and the folios, numbering from the commencement to the end of the papers, shall be marked on the margin of the page, and the clerk must refuse to file any pleading not thus folioed.

MAY 1st, 1877.

1. Notice of an intended application to the Circuit Court for the exercise of the general superintendence and jurisdiction conferred by section 4986 of the Revised Statutes of the United States, must be given within ten days after the entry in the District Court of the order complained of, by filing such notice in the clerk's office of that Court, and serving the same on the adverse party. The application must be made within thirty days after the entry of such order, or within such further time as may be allowed by an order of the District Judge filed within said thirty days in the clerk's office of that Court. An application cannot be made at a later period.

2. Except where special provision is otherwise made by statute, or where the aggrieved party proceeds by bill in equity, the application must be by petition filed in the office of the clerk of the Circuit Court, and verified by oath. The petition must designate the order complained of, and set forth the facts of the case, so far as may be necessary to show the errors, whether of fact or of law, alleged to have occurred in the District Court, and must point out such errors specifically, and the relief sought therefor.

3. The petitioner must, within five days after filing the petition, procure from the clerk of the Circuit Court a certificate of the filing of such petition, designating the order therein complained of by its date, and file the same in the office of the clerk of the District Court.

4. Within ten days after filing the petition, the petitioner must serve a copy thereof on the adverse party, who may file an answer thereto, verified by oath, within ten days after such service, and must, in that case, serve a copy of the answer on the petitioner within the further period of ten days. The petitioner may, within ten days thereafter, file a reply to the answer, and serve a copy thereof on the adverse party. The clerk may once extend either of these periods by order made before its expiration.

5. The application will be heard upon these papers only, unless the Court shall, of its own motion, otherwise direct. As soon as the case is disposed of, the clerk of the Circuit Court must certify the order to the District Court.

JUNE 8th, 1878.

No warrant of arrest shall be issued by a Commissioner of the Circuit Court, in a criminal case, unless such warrant is applied for by the District Attorney,

or by one of his regularly appointed assistants, in person, or by the authority of such District Attorney or assistant, produced in writing to the Commissioner, or by a Collector of Internal Revenue, or by his authority, produced in writing to the Commissioner, except that, in an extraordinary case, such warrant may be issued on other application, provided that the Commissioner shall assume the responsibility of giving reasons satisfactory to the Court for issuing the warrant in such extraordinary case. No account of any Commissioner for issuing a warrant in any other case will be approved by a judge; and every account shall be accompanied by an affidavit of the Commissioner, showing by whom each warrant was applied for, and on what authority, and, if the case was such an extraordinary case, what were the reasons for issuing the warrant.

Rules of the Circuit Court of the United States for the Eastern District of New York, adopted since the publication of the thirteenth volume of these Reports.

OCTOBER 16th, 1878.

In pursuance of the provisions of section 915 of an Act entitled, "An Act to revise and consolidate the statutes of the United States, in force on the first day of December, Anno Domini one thousand eight hundred and seventy-three," approved June 22d, 1874, it is ordered, that the provisions of the Act of the Legislature of the State of New York, entitled, "An Act relating to Courts, officers of justice and civil proceedings," passed June 2d, 1876, and the provisions of any Act heretofore passed by said Legislature amending said last named Act, so far as such provisions relate to a remedy by attachment against the property of a defendant, are hereby adopted by this Court as rules of this Court in respect to a remedy by attachment against the property of a defendant in a common law cause in this Court.

DECEMBER 11th, 1878.

The Clerk of the Court shall cause to be made up calendars, as follows:

For Appellate Causes, viz., Appeals in Admiralty, Writs of Error, Appeals in Equity cases, Appeals in Bankruptcy and Reviews in Bankruptcy.

For Original Causes, in two divisions, viz.:

1. Equity cases, (embracing pleas, demurrers, cases to be heard on pleadings and proofs, and cases to be heard on pleadings alone), and issues of law, in suits at law, upon the pleadings or upon special verdict.
2. Issues of fact triable by a jury, to which the United States are a party, including customs and revenue suits against collectors, and issues of fact triable by jury between private parties.

The first of each of these calendars shall be made up for the January Term of 1879, and the second for the October Term of 1879, and thereafter each shall continue to be the permanent calendar for Appellate Causes and for Original

Causes, subject to the addition of new cases, until the Court shall order a new calendar to be made. The causes remaining on each calendar shall be re-numbered for every October Term.

Only one note of issue to the clerk, and one notice of trial or hearing to the opposite party, shall be necessary for any permanent calendar. The note of issue, to be filed with the clerk not less than eight days before any term of Court, shall specify the proper date, in accordance with which the causes shall be arranged and numbered upon the calendars by the clerk, as follows:

For all causes upon the Appellate calendar—the date of filing the return in this Court;

For pleas and demurrers in equity cases set down by order for hearing—the date of such order;

For pleas replied to, and cases to be heard on pleadings and proofs, and cases to be heard on pleadings alone—the date of filing the last pleading;

For issues at law, in suits at law, upon the pleadings—the date of the issue;

For special verdicts—the dates thereof;

For issues of fact triable by a jury—the date of the issue.

When the calendars are so made and the causes numbered, each cause shall remain thereon and stand for trial or hearing until it is reached and called, when it may be moved by either party. If it be passed upon the regular call—no postponement being granted by the Court—it will go to the foot of the calendar. If it be a second time thus passed, it will be marked off the calendar. It may afterwards be re-noticed, and a new note of issue filed, stating the date at which it was last passed, as of which date it may be again placed on the calendar.

Motions for a new trial on cases or exceptions shall not be put on any calendar, but must be made before the judge who tried the cause, at such time and place as he may direct.

Application to have any cause on the first division of the calendar of Original Causes heard before the District Judge, may be made to such judge at any time, by either party, upon notice; and the cause will be heard at such time as he may direct.

Rule of the Circuit Court of the United States for the District of Connecticut, adopted since the publication of the thirteenth volume of these Reports.

JUNE 1st, 1877.

1. Notice of an intended application to the Circuit Court for the exercise of the general superintendence and jurisdiction conferred by section 4986 of the Revised Statutes of the United States, must be given within ten days after the entry in the District Court of the order complained of, by filing such notice in the clerk's office of that Court, and serving the same on the adverse party. The application must be made within thirty days after the entry of such order, or within such further time as may be allowed by an order of the District Judge

filed within said thirty days in the clerk's office of that Court. An application cannot be made at a later period.

2. Except where special provision is otherwise made by statute, or where the aggrieved party proceeds by bill in equity, the application must be by petition filed in the office of the clerk of the Circuit Court, and verified by oath. The petition must designate the order complained of, and set forth the facts of the case, so far as may be necessary to show the errors, whether of fact or of law, alleged to have occurred in the District Court, and must point out such errors specifically, and the relief sought therefor.

3. The petitioner must, within five days after filing the petition, procure from the clerk of the Circuit Court a certificate of the filing of such petition, designating the order therein complained of by its date, and file the same in the office of the clerk of the District Court.

4. Within ten days after filing the petition, the petitioner must serve a copy thereof on the adverse party, who may file an answer thereto, verified by oath, within ten days after such service, and must, in that case, serve a copy of the answer on the petitioner within the further period of ten days. The petitioner may, within ten days thereafter, file a reply to the answer, and serve a copy thereof on the adverse party. The clerk may once extend either of these periods by order made before its expiration.

5. The application will be heard upon these papers only, unless the Court shall, of its own motion, otherwise direct. As soon as the case is disposed of, the clerk of the Circuit Court must certify the order to the District Court.

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A

ACTION.

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ADMINISTRATOR.

1. An administratrix, appointed in New York, sued in this Court a New Jersey corporation, to recover, for the benefit of the next of kin of the intestate, damages for the death of the intestate, caused by the negligence of the corporation, the right of action being claimed under a statute of New Jersey: *Held*, that the action could not be maintained. *Mackay v. Central R. R. Co.*, 65

• ADMIRALTY.

1. Where the amount involved in an Admiralty suit is not sufficient to permit a review by the Supreme Court of the judgment of the Circuit Court, a general finding of facts and law by the latter Court is sufficient, under the Act of February 16th, 1875, (18 U. S. Stat. at Large, 315, § 1.) *1,265 Vitrified Pipes, &c.*, 274
2. In a suit *in rem* against a vessel, brought in the District Court, the vessel was discharged from custody, in that Court, on a stipulation for value. On appeal, a decree was rendered by the Circuit Court for the libellant, with a direction that the two stipulators for value pay into

that Court the amount of such stipulation. One of the stipulators having died, the libellant applied for the entry of a summary judgment against the other stipulator, for the amount of the decree, and for execution against him. It was objected, that the libellant had not exhausted his remedy against the claimant of the vessel, and that the death of the one stipulator defeated the right of the libellant to execution against the survivor: *Held*, that the application must be granted. *The O. F. Ackerman*, 360

3. Where a libellant, in Admiralty, in a cause of collision, has a decree in the District Court, for a specified amount, with costs, and, on appeal, this Court decrees for the libellant, the proper decree in this Court is not a decree for the amount awarded below, including the costs there, with interest from the date of the decree below, nor is interest to be added to the amount reported by the Commissioner below, from the date of his report, but the decree is to be for amount of the loss at the time of the loss, with interest from the time of the loss, and for the costs in the District Court, without interest on such costs. *Deems v. The Albany & Canal Line*, 474

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APPEAL.

1. It is too late to object to an appeal

where both parties have treated it as valid. *The Native*, 34

2. The filing in this Court, under General Order No. 26 in Bankruptcy, by a creditor in bankruptcy, of an appeal from a decision rejecting his claim, and of a statement of his claim, within ten days after giving notice of his intention to enter his appeal, are not jurisdictional requisites, and, if the requirements of § 4981 of the Revised Statutes in regard to the notice and bond on such appeal are complied with, this Court has power to relieve the creditor from any consequences of not filing such an appeal and statement within such ten days. *Fellows v. Burnap*, 68

See BANKRUPTCY, 1.

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B

BAIL.

1. Up to the time of the issuing of a removal warrant, a commissioner under whose commitment a prisoner is held, has jurisdiction to entertain an application for his release on bail, and to administer an oath to a person who tenders himself for justification as good bail for such prisoner. *United States v. Volk*, 15

See PERJURY, 1.

BANKRUPTCY.

1. A discharge in bankruptcy was

granted by the District Court, June 22d, 1875. A creditor who had opposed the discharge instituted, on the 15th of November following, proceedings of review. His interest was \$6,000 out of \$300,000 of debts. On the faith of the discharge, the bankrupt, aided by friends, had resumed his former business, and had entered into contracts with a foreign government to transport mails: *Held*, that, as the delay was unreasonable, and had operated to the prejudice of the bankrupt, the petition of review must be dismissed. *In re Murray*, 43

2. Under General Order No. 30, of the General Orders in Bankruptcy, adopted by the Supreme Court, April 12th, 1875, no fees can be allowed to a register, except such as are provided for by General Order No. 30, even for services rendered before such General Order was adopted. *In re Carstens*, 117

3. Under § 5108 of the Revised Statutes, as amended by the Act of July 26th, 1876, (19 U. S. Stat. at Large, 102,) which limits the time within which a bankrupt may apply for a discharge from his debts, to a time "before the final disposition of the cause," it is too late for him to apply for a discharge after his assignee has, under § 5096, been discharged from all liability, as assignee, to any creditor. *In re Brightman*, 130

4. The words, "the final disposition of the cause," mean the final disposition of the administration of the estate. *id.*

5. On the 19th of July, 1876, B. made, in New York, a valid voluntary assignment of all his property for the benefit of all his creditors, without preferences. The assignee accepted the trust and qualified. Afterwards a creditor recovered a judgment against B. in an adverse suit, on a debt existing before the assignment, and, under an execution thereon, the property covered by the assignment was levied on and taken possession of by the sheriff. Afterwards, and on the 11th of September, 1876, a petition in involuntary bankruptcy

- was filed against B. by creditors, other than the judgment creditor, and he was adjudged a bankrupt, and an assignee in bankruptcy was appointed. By agreement, the property was sold by the sheriff, and he held the proceeds subject to the order of the District Court in bankruptcy. That Court decided that the assignee in bankruptcy was entitled to such proceeds, to the exclusion of the execution creditor: *Held*, on review, that such decision was correct. *In re Beisenthal*, 146
6. The assignment was void, under the bankruptcy statute, as against the assignee in bankruptcy. *id.*
7. Where an assignment is void as to creditors, by reason of its being made to hinder, delay or defraud them, it does not in law oppose an obstacle to the enforcement of their legal rights. *id.*
8. But, where such an assignment is valid as to the debtor and as to creditors, and is avoided by the assignee in bankruptcy, only as having been made in contravention of the bankruptcy statute, no right of any judgment and execution creditor, intervening between the time of such assignment and the time of the filing of the petition in bankruptcy, can prevail over the superior right of the assignee in bankruptcy to the proceeds of the assigned property. *id.*
9. A general assignment for the benefit of creditors, without preferences, is an act of bankruptcy. *In re Friesee*, 185
10. Under § 5021 of the Revised Statutes, as amended by § 12 of the Act of June 22d, 1874, (18 U. S. Stat. at Large, 180,) the limiting by the bankruptcy Court of the time to be allowed for the requisite number and amount of creditors to join in a petition in involuntary bankruptcy, and the peremptory provision for the dismissal of the petition, are consequent on the judicial ascertainment by the Court that the requisite number and amount of creditors have not petitioned, and such ascertainment is to be made on reasonable notice to the creditors, and, until such ascertainment has taken place, further creditors may at any time unite in the proceedings. *id.*
11. Section 5106 of the Revised Statutes, which enacts that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit therefor against the bankrupt, until the question of his discharge shall have been determined, applies to all provable debts, as well to those which, under § 5117, would not be discharged, as to others. *In re Schwartz*, 196
12. A claim arising out of a contract for the purchase and sale of merchandise is a provable debt, within § 5106, although the sale was made because of a false representation by the debtor as to his pecuniary affairs, and the prosecution of such claim may be enjoined, under § 5016, if it be prosecuted in an action sounding in damages. *id.*
13. The District Court, on the petition of the assignee of a bankrupt, praying that the bankrupt might be ordered to pay over certain moneys alleged to be in his hands, and might be punished for contempt if he did not obey such order, took proofs on the question. The bankrupt testified that the money was, all of it, expended before the petition for an adjudication of bankruptcy was filed, and gave an account of the way in which it was expended. The District Court made an order denying the prayer of the petition. On review: *Held*, that the application to this Court, on review, to reverse said order, must be denied. *In re Mooney*, 204
14. The petitioner for review must satisfy this Court that a wrong decision was arrived at by the District Court, if such decision was one on a question of fact. *id.*
15. In this case he must satisfy this Court that a reasonable man would not be able to give credit to the relation given by the bankrupt, but

- would be satisfied of its substantial untruth. *id.*
16. The District Court having decided that it did not satisfactorily appear that the bankrupt had not made a full disclosure, this Court will sustain such decision, unless satisfied that the District Court ought clearly to have decided the other way. *id.*
17. A creditor of a bankrupt, after the adjudication in bankruptcy, brought a suit in a State Court for the foreclosure of a mortgage made to him by the bankrupt, and made the assignee in bankruptcy a party defendant to the suit, without obtaining the permission or direction of the bankruptcy Court to bring such suit: *Held*, that the State Court had authority to entertain the suit; that its prosecution was not a contempt of the authority of the bankruptcy Court; and that the proceedings in it were not void. *In re Moller*, 207
18. *Held*, also, that the bankruptcy Court had power to allow the creditor to prove a debt for the deficiency arising on the sale under the decree in the foreclosure suit, although no preliminary permission had been obtained from it to institute the suit. *id.*
19. The decision of the District Court in *In re Moller*, (8 *Benedict*, 526,) as to the priority of certain debts of the bankrupt for taxes, assessments and water rates, under subdivision 8 of § 5101 of the Revised Statutes, affirmed. *id.*
20. A determination by the District Court, in a bankruptcy proceeding, to which a creditor was a party, that such creditor had received a fraudulent preference, and that, in consequence thereof, he was disabled to prove any part of his debt, is an adjudication which debars him from subsequently proving his debt and authorizes the District Court to expunge his claim, when proved. *In re Leland*, 240
21. C. docketed a judgment against H., and an execution thereon was delivered to the sheriff, who at the time had in his possession the goods of H., by virtue of an attachment issued in a suit against H. by W. Afterwards, H. filed a petition in bankruptcy and was adjudged a bankrupt, and J. was appointed his assignee. Independently of the attachment, the sheriff took no possession of the goods of H. until after the petition in bankruptcy was filed. C. applied to the District Court to be paid the amount of his judgment in full, but his application was denied: *Held*, on review, that C. was entitled to be paid his claim in full. *In re Hull*, 257
22. The property being in the possession of the sheriff under the attachment, the lien of the execution attached to it, and remained, although the operation of the bankruptcy proceedings was to vacate the attachment. *id.*
23. The case of *In re Beisenthal*, (*ante*, p. 146,) distinguished. *id.*
24. H., who was a debtor to a bankrupt at the time of the commencement of the proceedings in bankruptcy, thereafter and before the adjudication of bankruptcy paid the debt to the bankrupt, without any actual notice or knowledge of the pendency of the bankruptcy proceedings, and in the usual course of business, but the money thus paid did not come to the hands of the assignee in bankruptcy. The assignee brought suit against H. to recover the debt: *Held*, that the suit could be maintained. *Howard v. Crompton*, 328
25. L. executed a mortgage to A., his brother, in Vermont, to secure a pre-existing debt, more than two months before a petition in bankruptcy was filed against L. The mortgage was not recorded until within two months before such petition was filed: *Held*, that the mortgage was not fully made, under the laws of Vermont, as against the assignee in bankruptcy of L., until it was recorded. *Boswick v. Foster*, 436

See *APPEAL*, 2.

BILL OF EXCEPTIONS.

See PRACTICE, 10, 12.

BILL OF LADING.

1. Casks of wine were shipped to New York, on a vessel, under a bill of lading which stated that the casks were in good order and well conditioned, and said, also: "Weight and contents unknown; not liable for average leakage or breakage." The casks, without reference to their contents, were delivered from the vessel at New York, and placed in the custody of officers of the customs. There was some leakage during the voyage. Some of the casks were empty on their arrival, and others were partially so. The casks were of an inferior quality, and were in poor condition, on their arrival, arising from their quality and the usual perils of navigation. The master of the vessel libelled the casks of wine *in rem*, in Admiralty, for the freight money, and sued the claimants therefor, in the same suit: *Held*,

(1.) The vessel was not liable for leakage and breakage not arising from her own negligence.

(2.) Proof of the inferior quality of the casks threw on the claimants the burden of showing that the injury to the casks was caused by the negligence of the vessel.

(3.) The burden was on the claimants, of proving that the leakage was greater than the average in such casks.

(4.) The claimants and the property could be joined in the suit. 680
Quarter Casks, 517

2. Where there is no special agreement as to the time within which a vessel is to be unloaded, the law implies that it is to be done within a reasonable time after her arrival. *Henley v. Brooklyn Ice Co.*, 522

3. In the present case, it was held that the consignee was required only to use proper diligence in taking off his cargo in the customary way, and that he had used such diligence. *id.*

See CARRIER, 2 to 4.

BOND.

1. A bond to the United States, signed and sealed by W., G., C. and M., and acknowledged by each as his act, recited that W. and G., composing the firm of A. & Sons, as principal, and C. and M., as sureties, were held, &c., jointly and severally, to the United States, in the sum of \$9,000, and was conditioned that the firm of A. & Sons should pay all taxes assessed upon tobacco manufactured by the firm. W. and C. died, and H. was appointed administratrix of W. The United States then brought suit on the bond against H., as administratrix of W., and G. and M., claiming a judgment for \$9,000. On demurrer to the complaint, by H.: *Held*,

(1.) That, as the complaint set forth a several obligation by the obligors, it was good, because, by the law of New York, a several liability could be enforced, in one suit, against all the defendants;

(2.) That this was so, although H. was sued as administratrix, and the others as individuals;

(3.) That the bond was not the obligation of the firm, and that, therefore, it was not necessary to exhaust all remedies against G., as surviving partner of the firm, before suing on the bond. *United States v. Lawrence*, 229

See INTERNAL REVENUE, 3.
JUDGMENT.
LIMITATION OF ACTION.
TOWN BONDS.

C

CARGO.

See BILL OF LADING.

CARRIER.

1. Goods, in the course of transportation from West Springfield, Massachusetts, to Cleveland, Ohio, were destroyed by fire in the depot of the Western Railroad Corporation, at

East Albany, New York. That corporation, when it received the goods at West Springfield, gave a receipt, setting forth that it had received 4 cases, marked J. B. C., Cleveland, Ohio. The receipt, on its face, said: "This contract, and the responsibility of the parties hereto, being limited and controlled by the rules and regulations printed upon the back of this receipt;" "it being also understood, that this corporation assumes no liability beyond the end of its own line, and that, so far as it acts as agent for other parties participating in the joint transit aforesaid, said parties are separately liable." The back of the receipt said: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight." "The company will not hold itself liable as common carriers, for articles of freight, after their arrival at their place of destination and unloading at the company's warehouse or depots." "All articles of freight must be taken away within 24 hours after being unladen from the cars." The cases were marked as described in the receipt, and also marked, "care of Western Transportation Co.," a corporation engaged in carrying freight on the Erie Canal. The terminus of the road of the Western Railroad Corporation was at East Albany. The goods arrived there and were unladen at its warehouse. Three days afterwards the warehouse took fire, and the goods were consumed, without fault on the part of the corporation. It did not appear that notice of the arrival of the goods was given by the corporation to the Western Transportation Company: *Held*, that the Western Railroad Corporation was liable for the value of the goods. *Ayres v. Western R. R. Co.*, 9

2. Under an ordinary bill of lading, freight is demandable only when the goods are discharged from the vessel, and an opportunity is had for their examination by the party who is to receive them; but the carrier is not bound to part with the possession, or to make actual delivery, except upon

payment of the freight. 1265 *Fitted Pipes, &c.*, 274

3. Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels, on the freight of such parcels being separately paid. *id*
4. Where a carrier of goods by a vessel stood upon his legal right not to deliver a cargo, or any part of it, till payment of the freight, and the consignee of the cargo stood upon his right not to pay the freight until the cargo was discharged, ready to be completely delivered upon payment of freight, and subsequently the cargo was landed, but no notice was given to the consignee nor any demand made upon him for the freight: *Held*, that a suit against the goods for the freight was prematurely brought, when brought before such notice or demand. *id*
5. The New Haven and Northampton Company, a railroad corporation, owning a dock at New Haven, refused to receive coal on its cars, on said dock, from a canal-boat lying thereat, unless the master of the canal-boat would employ shovellers designated by the company, at a price fixed by the company, which was intended to be; and generally was the ordinary market price, to shovel the coal on board of the canal-boat into tubs belonging to the company, which tubs were then to be hoisted, by means of a derrick on the dock, so that the coal could be dumped into such cars. The canal-boat paid ten cents per ton to the company for the use of the tubs and machinery: *Held*, that the requirement of the company was not a reasonable one and could not be enforced. 318½ *Tons of Coal*, 453

See BILL OF LADING.

CERTIFICATE.

See PROBABLE CAUSE.

CHARTER PARTY.

1. Where a vessel was chartered for

"a series of voyages" from G. to W., from May 2d to November 1st, with coal as a cargo, each trip, for a compensation per ton of coal, the charterer was not bound to furnish a cargo, at G., on October 19th, unless there was reasonable cause to believe that the voyage could be completed, in the usual way, by November 1st. *Poland v. Maryland Coal Co.*, 519

2. As the charter specified what lay days should be allowed for loading, the charterer was not required to furnish a cargo, except at his own convenience, during such lay days. *id.*

COLLECTOR.

See PROBABLE CAUSE.

COLLISION.

1. A collision took place between a steamer and a schooner on the open sea, in clear weather, in broad daylight, the vessels seeing each other at a distance of seven or eight miles, and for twenty minutes or half an hour. The schooner did not change her helm except in the moment of peril, when her master attempted to port, but did not succeed, and was compelled to abandon his wheel: *Held*, that the steamer was in fault in attempting to pass the schooner at too short a distance off, and that the schooner was free from fault. *The Benefactor*, 254

2. The steamboat W. had the steamboat S. off her starboard side and the courses of the two vessels crossed. The pilot of the W. saw that the S. must encounter a cross tide, and that it would affect her movements. He made no allowance for this and did not give the S. sufficient room. A collision ensued between the two vessels: *Held*, that the W. was wholly in fault. *The Franz Sigel*, 480

3. The owners of a sailing ship and her cargo sued a British corporation, the owners of a British steamer, in Admiralty, for the value of the ship

and cargo, lost by a collision with the steamer. The steamer was damaged by the collision, and, in running for a harbor, grounded and then went to pieces. A quantity of anchors, chains, rigging and cabin furniture, of the value of several thousand dollars, was saved from her and received by the respondents. The answer of the respondents set up that the steamer was sunk and destroyed by the collision, and that there was no liability in *personam* against the respondents, for the loss of the ship: *Held*, that, under the Act of March 3d, 1851, (9 U. S. Stat. at Large, 635,) as the respondents had not instituted any proceedings to have the limitation of their liability adjudged, and had not surrendered or transferred what was saved from the vessel, they could not have the benefit of that Act. *Dyer v. National Steam Nav. Co.*, 483

4. *Held*, also, that the respondents, by their delay, and by allowing a final decree to go against them in the District Court, had waived their right to institute such proceedings. *id.*
5. *Held*, also, that no limitation of liability could be claimed by the respondents under the general maritime law, because they had not surrendered their interest in the steamer. *id.*
6. Whether the Act of 1851 applies to the owners of a foreign vessel, *quere.* *id.*
7. The jurisdiction of the District Court to enforce the personal liability of the respondents, as a foreign corporation, was properly exercised, by issuing an attachment against its property. *id.*
8. The proper rate of interest to be allowed on the value of the property lost by the collision was 6 *per cent.*, and not 7 *per cent.* *id.*
9. The cargo lost was guano belonging to the Republic of Peru. Under the facts in this case, the proper rule of damages for the loss of the cargo was held to be, neither the market price of the guano at its port of destination, less the costs and charges which

would have been incurred from the time of the loss until it could have been placed in such port ready for sale, nor the cost of the cargo at the place of shipment, with the expenses and charges actually incurred, and interest thereon, but the value of the guano in Peru, as an article to be dealt with there by a merchant seeking to export it and realize only a fair mercantile profit on it, such value to be ascertained by deducting from its value at its port of destination, shipping expenses, freight, duties, marine insurance, port charges and commission for selling, and then deducting from the net proceeds 10 to 12 *per cent.*, as a fair average mercantile profit. *id.*

10. In the case of a collision between a steamer and a sailing vessel, the burden is upon the steamer to show a sufficient reason for not keeping out of the way of the sailing vessel. *The Java*, 524

11. Where, in such a collision, all on the sailing vessel who knew anything of the occurrences which immediately preceded the collision, were lost, it is incumbent on the steamer to make out, by clear and satisfactory proof, any faults charged on the sailing vessel. *id.*

12. A steamer, in mid-ocean, on a dark night, had no lookout on her fore-castle, but had two lookouts on the bridge, one at each end of it. She had her fore-trysail set, which obstructed the view ahead from the bridge, and she was going at her utmost speed against a heavy sea. Under the circumstances, the lookouts could not reasonably have been required to remain on the fore-castle. The steamer having collided with a sailing vessel: *Held*, that, with the speed of the steamer, and the fore-trysail set, the lookout was insufficient, and the steamer was in fault therefor. *id.*

13. A., the master and owner of the canal boat M., filed a libel *in rem*, in Admiralty, in the District Court, against the screw steamer C., for himself and for an insurance company, alleging that the company was the in-

surer of the cargo of the M., and that the M., and her cargo, had been damaged by a collision between the M. and the C., through the fault of the C. The libel did not allege that the cargo was owned by an innocent party, nor that the insurance company had paid the loss. The collision occurred in a slip, as the C. was moving out. The District Court held that the C. was in fault for allowing herself to be drawn over toward the M., by a stern line fastened to the opposite pier, which was not cast off in time; and that the M. was in fault for being insufficiently fastened, so that she was drawn over toward the C. by the suction caused by the screw of the C. On appeal by both parties, this Court held, for the same reasons, that both vessels were in fault, and made a decree holding the C. liable for only one-half of the damages sustained by both the M. and her cargo. *The City of Paris*, 531

14. After the decision of this Court was announced, the insurance company moved (1) that it might be allowed to prosecute the suit for its own interest; (2) that it might be made a party libellant, and allowed to prove that the cargo on board the M. was owned by an innocent party, that it was insured against loss by the company, and that the loss had been paid in full; (3) that the record brought up on appeal might be amended by inserting in the apostles the minutes of the Commissioner, on the reference in the District Court to ascertain the amount of damages; and (4) that a decree might be entered against the C., and in favor of the insurance company, for the full amount of the damages to the cargo: *Held*,

(1.) That the company might, if necessary, be admitted as a party, in order to settle its rights to its share of the recovery, as against the libellant, but only to that extent;

(2.) That, as the M. was sold three times between the time of the collision and the time of the decree of the District Court, and as the remedy over against the M., in favor of the C., had been lost by the delay, the company could not now be allowed to make proof of the innocent ownership of the cargo, so as to charge the C.

with the entire damage to the cargo, under the rule established in *The Atlas*, (93 U. S., 302,) although the decision in *The Atlas* was not made until after the libellant had appealed;

(3.) That, as the report of the Commissioner was not excepted to, it was not necessary that his minutes of testimony should be brought up;

(4.) That there could not be a decree against the C. for the full amount of the damages to the cargo. *id.*

15. In a collision between a steamer and a schooner, in the East river, between Brooklyn and New York, the steamer going down the river and the schooner up, the steamer was held in fault for attempting to pass too close to the schooner, between her and the New York shore, when there was plenty of room on the other side, and the steamer knew that the schooner was not crossing the river to the Brooklyn side, but was going up under the New York shore, to avoid the current. *The Panita*, 545

16. The schooner was held in fault, because her lookout, although he saw the steamer's light, failed to report it to the man at the wheel as soon as he could and should have reported it. *id.*

See DAMAGES.
INTEREST.
NAVIGATION.

COMMISSIONER.

See BAIL.
EXTRADITION, 2, 3.
PERJURY, 1.

COMMON CARRIER.

See CARRIER.

CONSPIRACY.

See EVIDENCE, 1 to 8.

CONSTITUTIONAL LAW.

1. A grant of power in the Constitution is to be construed according to the

fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the Constitution was adopted. *In re Jackson*, 245

See PRACTICE, 4 to 6.
TAXATION.

CONSTITUTION OF THE UNITED STATES.

| | |
|--------------------|-----|
| Article 1, sec. 8, | 248 |
| " 2, " 8, | 249 |
| " 8, " 2, | 251 |

CONSTITUTION OF VERMONT.

Constitution of 1793, chap. 1, art. 9,
Taxes, 428

CONTRACT.

1. Where an illegal contract or transaction is only partially performed, there is a *locus penitentiae*, and either party may rescind the contract. *Knowlton v. Congress & Empire Spring Co.*, 384
2. K. subscribed for shares in the capital stock of a corporation, in increase of its stock. The proceeding was illegal, because in contravention of the statute under which the corporation was organized. K. paid \$13,980 as an instalment on his subscription, on the first call. By the subscription, he was to forfeit all he had paid, if he failed to pay subsequent calls. He so failed, and, after the corporation had declared his rights to be forfeited, but before any scrip had been issued for the new stock, the corporation abandoned the plan of increasing the stock. K. sued the corporation to recover back the \$13,980: *Held*, that he was entitled to recover it. *id.*

COPYRIGHT.

1. The statutory provisions which confer the rights and regulate the remedies of persons who register in the Patent Office, under the Act of June 18th, 1874, (18 U. S. Stat. at Large,

78,) prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948 to 4971 of the Revised Statutes, in regard to copyrights. *Marsh v. Warren*, 268

CORPORATION.

See ADMINISTRATOR.

CARRIER, 1.
CONTRACT, 2.
EQUITY, 8, 9.
EVIDENCE, 9 to 13.
JURISDICTION, 1.

COSTS.

1. Items of costs which would have been taxable in favor of a party in a State Court, on a judgment for him, are not taxable in his favor, on a judgment for him in this Court, after the removal of the cause into this Court, unless such items are taxable under §§ 823 and 824 of the Revised Statutes. *Clare v. National City Bank*, 445

CRIMINAL PRACTICE.

1. A motion, being made to quash an indictment for a misdemeanor, an information was filed setting forth the same charge as that in the indictment, accompanied with an affidavit as to the identity of the offence. A *nolle prosequi* was entered on the indictment, and the defendant moved to quash the information, on the ground that there had been no preliminary examination before a Commissioner nor any order to show cause: *Held*, that the motion must be denied. *United States v. Ronzone*, 69
2. An indictment will not lie in a United States Court in New York, against a person for having fraudulently registered at a registry of voters in New York, for an election for representatives in Congress, when he was disqualified as a voter by reason of having been convicted of a felony, where the conviction set forth is for having committed the offence created by § 5431 of the Revised Statutes of the United States, of ut-

tering a counterfeit security of the United States. *United States v. Barnabo*, 74

3. Under § 5467 of the Revised Statutes, an indictment will lie which charges a person employed as a letter carrier in the postal service, with having embezzled a letter which was intended to be conveyed by mail and contained an article of value, and had been entrusted to him, and had come into his possession as such letter carrier. *United States v. Pelletreau*, 126
4. Said § 5467 is not confined to the offence of stealing or taking things out of a letter, packet or bag. *id*
5. The sentence of a convicted prisoner, sentenced to be imprisoned for twelve months, did not fix the place of confinement. The sentence was executed in Ludlow street jail. Ten months of the term having expired, the prisoner applied for his discharge, on the ground that, under the Act of March 8d, 1875, (18 U. S. Stat. at Large, 479,) he was entitled to a deduction of five days during every month: *Held*, that, as the State of New York had a system of commutation for its own prisoners, the deduction could not be allowed. *United States v. Schroeder*, 344
6. *Held*, also, that the prisoner would be entitled, under § 5543 of the Revised Statutes, to the deduction of one month, there allowed, on the certificate and approval required by that section. *id*
7. After the conviction of a defendant, he moved in arrest of judgment, and the case went to the Supreme Court on a certificate of a division of opinion. After a decision by that Court, the defendant moved in this Court for a new trial: *Held*, that it was too late to make such a motion. *United States v. Simmons*, 473

See EVIDENCE, 1 to 8.

INDICTMENT.

INTERNAL REVENUE, 5.

NATURALIZATION, 1.

PERJURY.

PLEA.

POST OFFICE.

SUFFRAGE.

CUSTOMS.

See DUTIES.

D

DAMAGES.

1. The circumstances stated, under which, in this case, the value of the canal-boat was allowed as upon a total loss. *Deems v. The Albany & Canal Line*, 474
2. Where an allowance is made for the full value of a vessel sunk and lost by a collision, as for a total loss, the expense of raising the vessel, to ascertain the extent of the loss, is a proper charge. *The Mary Eveline*, 497

See COLLISION, 9, 13, 14.

EQUITY, 1 to 3.

INTEREST.

NEGLIGENCE.

PATENT, 20 to 25.

PRACTICE, 4 to 6.

DEBT.

See INTERNAL REVENUE, 2.

DEMURRER.

See EQUITY, 4, 5.

MORTGAGE, 3.

PLEA.

DISTILLED SPIRITS.

See INTERNAL REVENUE, 1 to 3,
5 to 10.

DISTILLERY.

See INTERNAL REVENUE, 1.

DISTRICT COURT.

1. Whether the District Court can try an action at law otherwise than by a jury suggested. *Howard v. Crompton*, 328

See PRACTICE, 9.

DUTIES.

1. H., on the entry of merchandise at the custom house, added 18 *per cent.* to the market value, as stated in the invoice, with a protest, stating that he made the addition to prevent a seizure, and that the real value was the original invoice value. On like merchandise entered before by H., on like invoices, 18 *per cent.* had, on appraisal, been added to the invoice value, and the goods had been seized for forfeiture. In a suit brought by H. to recover back the duties paid on the added 18 *per cent.* : *Held*, that the action could not be maintained. *Haas v. Arthur*, 346
2. After the addition by H. of the 18 *per cent.*, the value of the goods, for duty, could not be fixed, by appraisal, at a less sum than that arrived at by such addition. *id.*
3. S., through his agent, K., purchased, in England, unfinished goods, and, through K., had them dyed there by one man and made up by another. In each case S. paid the cost of the work. K. then invoiced the goods to S., at New York, at a price equal to the cost of purchase, dyeing and making up, with K.'s commission added. Entry of the goods was made on such invoice, on the ordinary purchaser's oath, provided for by § 4 of the Act of March 1st, 1823, (3 *U. S. Stat. at Large*, 730,) (now § 2841 of the Revised Statutes.) The valuation in the invoice was below the fair market value: *Held*, that the invoice and the oath ought to have been such as the statute requires from a manufacturer. *Sinn v. United States*, 550

E

EQUITY.

1. Where a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a Court of equity, and the ultimate object of the plaintiff is to obtain damages, the Court, having granted a discovery, will proceed and give the

proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. *Magic Ruffle Co. v. Elm City Co.*, 109

2. Where a bill is brought for a discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account. *id.*
3. But if the relief to be ultimately rendered is the payment of damages, and a discovery is needed, and the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, then, although the case is not one of trusteeship or agency, a Court of equity will assume jurisdiction of the whole case and proceed to a final decree on the merits. *id.*
4. Where a person commences a suit in equity in this Court, and the defendant in such suit files a cross-bill against him, in this Court, he cannot set up, as a ground of demurrer to such cross-bill, that a State Court had acquired prior jurisdiction, on a bill brought in that Court, for the same relief, by the plaintiff in such cross-bill. *Brandon Mfg. Co. v. Prime*, 871
5. Where a demurrer to the whole of a bill sets up that some of the relief prayed is not cognizable in equity, it will be overruled, if some of the relief prayed is properly prayed. *id.*
6. A cross-bill is properly filed to establish an equitable title to letters patent, the legal title to which is in the plaintiff in the original bill filed for an infringement of such patent. *id.*
7. Where a cross-bill, brought for relief as well as defence, shows that persons not parties to the original bill are necessary parties to the cross-bill, they may properly be made such. *id.*
8. H., the owner of shares in the capital stock of a Connecticut corporation, filed a bill in equity against the pres-

ident and the directors and the corporation, alleging acts of mismanagement and breach of trust on the part of the president and directors, and that the directors had sanctioned all such acts, and that a request to them to take proceedings for the relief of the stockholders, would be useless. The bill prayed for the dissolution of the corporation, and for the distribution of its assets among its creditors and stockholders, and for such further relief as the case might require. The defendants put in a plea, that, by the statutes of Connecticut, a Court of equity could dissolve a corporation only under certain specified circumstances, which did not exist in this case: *Held*, that the plea was good. *Hardon v. Newton*, 376

9. *Held*, also, that, on the facts set forth, the Court could prevent the continuance of the breach of trust, and could compel the officers to account for such as they had committed, but that, to obtain such relief, it should be specifically prayed for; and the plaintiff was given leave, on motion, to amend his bill in respect to the prayer for relief. *id.*

See INJUNCTION.

MORTGAGE.

PATENT, 11 to 17, 19.

PLEADING, 1, 2.

PRACTICE, 8, 7, 11, 13, 14.

TRADE-MARK.

EVIDENCE.

1. G. and O. were indicted for a conspiracy with S. and others to defraud the United States out of the duties on silks and laces to be imported contrary to law. The indictment set forth several acts done by several of the accused to effect the object of the conspiracy. On the trial of G. and O., only one of such acts, an act of O., was proved. Other acts, not set forth, done by the defendants to effect the object of the conspiracy, were proved, to show its character. S. swore to an agreement made by him with O., who was the purser of a steamer, that O. should bring in goods, which S. should sell, for a commission. Under this agreement,

- O. brought in silks in barrels and cases, which S. disposed of, no duty being paid. S. sent the proceeds to O. W. was employed on O.'s steamer. S. swore that W. introduced him to O.; that he, in W.'s presence, agreed with O. to dispose of silks which O. should bring out in the same way W. brought out his; and that there was, at the time, an agreement between S. and W., whereby W. was bringing, in the steamer, silks which were landed without paying duty, and sold by S. At the trial, letters from W. to S. were admitted as evidence for the prosecution, to explain the nature of the importations by W., and of the agreement between S. and O., and to corroborate the testimony of S. *United States v. Graff*, 381
2. A witness was allowed to describe the marks on the heads of certain barrels, to identify them, without proving the destruction or loss of such heads. *id.*
3. A written statement made by O., describing his connection with S. in smuggling silks, was admitted in evidence against O. It was sworn to. When O. made it, he was not under arrest, but he had been told he was charged with being connected with smuggling. He made it freely, without the influence of threat or promise. *id.*
4. S., after the discovery of his guilt, fled, and wrote a letter to G., which never reached G. The letter spoke of O. and of the smuggling operations. There was evidence to show the connection of G. with O. and S., in the conspiracy. The letter, by its contents, was an act done in furtherance of the conspiracy, and was admitted in evidence against G. and O. *id.*
5. The evidence considered, which warranted the jury in finding that G. was a co-conspirator with S. and O. *id.*
6. A variance between the indictment and the evidence, as to the time when the alleged overt act was committed, is immaterial. *id.*
7. A party cannot wait until evidence is given, and the case of the other side is closed, and then produce a stipulation, as ground for striking out such evidence. *id.*
8. The prosecution put in evidence the manifest of the steamer, written by O., and filed in the Custom House. An affidavit endorsed on it, made by the master of the steamer, more than a month after such filing, was offered in evidence by the defence, and excluded. *id.*
9. In a suit to recover damages for the alleged fraudulent sale to the plaintiff by two defendants, of a mine, the plaintiff introduced evidence to show a fraudulent intent in the vendors, consisting of statements made to them, or one of them, unfavorable to the character and value of the mine: *Held*, that the defendants, in reply, had a right to show the statements of third persons, made to them, prior to the sale of the mine, in regard to its character and value. *Emma Silver Mining Co. v. Park*, 411
10. P., one of the defendants, was a director and a shareholder in the plaintiff corporation. At the trial, the plaintiff offered in evidence the minutes of a meeting of the plaintiff's board of directors, held in England, nearly a year after the sale of the mine, and at which P. was not present, and when he was absent from England, with a view to charge him with knowledge of the contents of a telegram sent to the directors by the president of the company, and of the action of the directors thereon: *Held*, that the evidence was not admissible. *id.*
11. Letters written by P. to his co-defendant, while they owned the mine, and during the period when it was claimed by the plaintiff they were getting up a fraudulent scheme to sell the mine to the plaintiff, the letters purporting to state what was transpiring at the time, and speaking of its development and value, were admissible in evidence in favor of both defendants. *id.*

12. The verdict of the jury was upheld, as not contrary to the evidence, and the charge of the Court to the jury was upheld, as not unjust to the plaintiff. *id.*

18. The suit being one in which it was alleged that the directors of the plaintiff corporation were induced to purchase the mine by the fraudulent representations or concealments of the two defendants, as vendors, regarding material facts, and they being two of such directors at the time of the sale of the mine, it was held, that if the defendants withheld from their co-directors any information as to material facts affecting the mine, intending thereby that their co-directors should be misled, their conduct was actionable concealment, if it operated to induce the purchase. *id.*

See BILL OF LADING, 1.
FIRE INSURANCE, 8.
PATENT, 24, 25.
PRACTICE, 1, 2.

EXECUTION.

See BANKRUPTCY, 21 to 23.
PROBABLE CAUSE.

EXECUTOR.

See ADMINISTRATOR.

EXTRADITION.

1. The extradition treaty between the United States and Belgium, (18 *U. S. Stat. at Large*, 804,) declares that its provisions shall not apply to any crime committed prior to the date of the treaty, except murder and arson. The date of the signing of the treaty was March 19th, 1874. It was not to take effect until 20 days after the day of the date of the exchange of ratifications. They were exchanged April 30th, 1874: *Held*, that a crime committed in Belgium on the 1st of May, 1874, was covered by the treaty. *In re Vandervelpen*, 187

2. Where an extradition case, under a treaty, is brought before a United

States Commissioner, it is his judicial duty to judge of the effect of the evidence, and no other judicial officer has any power to review his action thereon. *id.*

8. In a case of extradition, before a United States Commissioner, where he has before him legal and competent evidence relating to the charge against the accused, it is his judicial duty to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon has been conferred on any other judicial officer. *In re Wiegand*, 370

F

FEEES.

1. Where a note of issue on an appeal in Admiralty is delivered to the clerk, under Rule 55 of this Court, with a view to his putting the cause on the calendar of causes to be tried, for a particular term, a fee of \$1 to the clerk for the service is a lawful and proper fee, and, if paid by a successful party, can be taxed against his adversary, as costs in the cause. *The Alice Tainter*, 225

2. It is proper for the clerk to charge for including the evidence, in a suit in Admiralty, in the final record, on final decree, notwithstanding the provision of § 1 of the Act of February 16th, 1875, (18 *U. S. Stat. at Large*, 315,) in regard to appeals in Admiralty to the Supreme Court. *id.*

See BANKRUPTCY, 2.

FERRY.

1. By the 15th section of the Montgomerie charter, granted to the city of New York in 1780, there was granted to the corporation of that city the sole power of establishing such ferries "around Manhattan's Island," "for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of

Manhattan to Nassau Island, and from thence back to Manhattan's, and also from the said Island, Manhattan's, to any of the opposite shores all around the same Island," in such and so many places as the Common Council should think fit, and the ferriages from such ferries were also granted to the corporation. The boundaries of the city were made co-extensive with Manhattan Island. In 1874, part of another county was annexed by the Legislature of New York to the city of New York, and declared to be a part of the city as if it had always been so, and the like powers were given to the corporation, over the annexed territory, as if it had always been a part of the city. Afterwards, a ferryboat, fitted up to transport railroad cars only, was run to and fro between a place in such annexed territory and a place in New Jersey opposite the city of New York, connecting with railroads running from the termini of the ferry. The boat was provided with two railroad tracks, which prevented the entrance of ordinary vehicles and of foot passengers, except as transported in the cars: *Held*, that such ferry was not such a ferry as the charter contemplated, and did not invade the exclusive franchise of the corporation. *Mayor v. N. E. Transfer Co.*, 159

2. Whether the Legislature can interfere with the ferry franchise granted by said charter, *quere.* *id.*
3. Whether the franchise so granted is limited to establishing ferries from the original territory of the city, *quere.* *id.*

FINE.

1. The fine provided for in § 4 of the Act of July 18th, 1866, (14 U. S. Stat. at Large, 179,) which is substantially identical with § 3082 of the Revised Statutes, cannot be recovered in a civil action, but must be imposed after a conviction on a trial for a crime. *United States v. Claflin*, 55

FIRE INSURANCE.

1. Circumstances stated which amounted to a ratification, by a fire insurance company, by silence, of the act of its agent, in accepting the responsibility of a broker to whom the assured paid the premium, in lieu of the money of the assured. *Bennett v. Maryland Fire Ins. Co.*, 422
2. The policy not requiring the payment of the premium in money, the premium was paid by the acceptance by the agent of the promise of the broker, in lieu of the money, and the company could not cancel the policy without repaying the premium to the assured. *id.*
3. Provisions in a policy of fire insurance for notice of loss and proofs of loss are for the benefit of the insurer, and can be waived. *id.*
4. Notice of loss to the agent of the insurer was, in the absence of knowledge of the revocation of his agency, notice to the insurer. *id.*
5. After knowledge by the insurer of the fact of loss, its repudiation of the policy without objecting to the sufficiency of the notice of loss, was an acquiescence in the sufficiency of such notice. *id.*
6. Repudiation by the insurer of liability for the loss was a waiver of the necessity of furnishing proofs of loss. *id.*
7. An assignment by parol of the right of action on a policy of fire insurance, after a loss, is sufficient to transfer the cause of action. *id.*
8. Where the answer to the complaint, in an action on a policy of fire insurance, only denies the allegations of the complaint, the defendant cannot prove a defence based on a breach of any conditions in the policy other than such as are conditions precedent to the right of the plaintiff to recover. *id.*

FORFEITURE.

1. The decision of the Supreme Court

in *Stockwell v. The United States*, (13 Wallace, 531,) was, that the 4th section of the Act of July 18th, 1866, (14 U. S. Stat. at Large, 179,) did not effect such a repeal of the 2d section of the Act of March 8d, 1823, (3 *Id.*, 781,) as took away the right of the United States to proceed under said 2d section, upon a cause of action which arose before the Act of 1866 took effect. *United States v. Olafin*, 55

2. As to causes of action falling within the terms of the 2d section of the Act of 1823, which arose after the passage of the Act of 1866, and before the passage of the Revised Statutes of the United States, no suit can be maintained brought after the passage of the Revised Statutes. *id.*

3. No recovery can be had under said 2d section in respect of any acts done after the enactment of the Revised Statutes. *id.*

See LIMITATION OF ACTION.
INTERNAL REVENUE, 7, 9.
PATENT, 8.

FRAUD.

See CONTRACT.
EVIDENCE, 9 to 13.
LIEN, 8.
PLEADING, 3.

G

GRAND JURY.

See PLEA.

H

HABEAS CORPUS.

See EXTRADITION, 2.

HYPOTHECATION.

See LIEN.

I

INCOME TAX.

See INTERNAL REVENUE, 4.

INDICTMENT.

1. An indictment, under § 3296 of the Revised Statutes, which charges a removal of a certain quantity of "distilled spirits" on which the tax had not been paid, to a place other than the distillery warehouse, is good. *United States v. Anthony*, 92

See CRIMINAL PRACTICE, 1 to 4.
INTERNAL REVENUE, 5.
NATURALIZATION, 1.
PLEA.

INFORMATION.

See CRIMINAL PRACTICE, 1.

INJUNCTION.

1. Reasons stated why a motion to dissolve an injunction should be considered and disposed of on its merits, rather than that the injunction should be continued until the hearing, even if its maintenance then should be doubtful. *Wells v. Central Vt. R. R. Co.*, 426

2. Whether § 3224 of the Revised Statutes of the United States, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court," applies to a suit in a Federal Court to restrain the collection of a State tax, *quere. id.*

See PATENT, 11 to 19.
TRADE-MARK, 1 to 5, 7.

INSURANCE.

1. A policy of insurance against accident provided for the payment to the plaintiff of a specified sum within a specified time after sufficient

proof that the insured "shall have sustained bodily injuries effected through external, violent and accidental means," "and such injuries alone shall have occasioned death," "provided, that this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation or medical or mechanical treatment for disease." A specified dose of opium was prescribed to the insured by his physician, to allay nervousness and restlessness. By inadvertence, he took more opium than he intended and his death was caused thereby: *Held*, that his death was caused wholly or in part by medical treatment for disease, and was not covered by the policy. *Bayless v. Traveller's Ins. Co.*, 148

2. *Held*, also, that the case was not one of bodily injury effected through external, violent and accidental means, occasioning death, within the meaning of the policy. *id.*

See FIRE INSURANCE.
LIFE INSURANCE.

INTEREST.

1. Where, in a suit in Admiralty, for a loss by a collision, items of damage are allowed as for a total loss, interest is to be allowed at 6 per cent., from the date of the loss, and not at 7 per cent. *The Mary Eveline*, 497

See COLLISION, 8.

INTERNAL REVENUE.

1. Under the 20th section of the Act of July 20th, 1868, (15 *U. S. Stat. at Large*, 133,) the producing capacity of a distillery, and not the amount of spirits produced, is made the measure of taxation. *United States v. Halloran*, 1
2. An assessment by an officer is not a condition precedent to the collection of taxes, when the statute prescribes the amount to be paid; and such amount can be recovered in an action of debt. *id.*

3. In an action upon a distiller's bond, an erroneous assessment, which did not include the amount actually due, as prescribed by the statute, is not conclusive against the Government. *id.*

4. Under § 6 of the Act of July 14th, 1870, (16 *U. S. Stat. at Large*, 257,) which imposes a tax on gains, profits and income for the year 1871, and no longer, the amount of a promissory note taken in 1871, on the sale, in that year, of a patent right, but not due until some time in 1872, and paid in that year, is not taxable as income for 1871. *United States v. Schillinger*, 71

5. Spirits consigned to M. arrived, and he was notified, by the carrier, of their arrival. He surrendered his bill of lading, paid the freight, sold the spirits to a third party, and gave such party an order to receive the spirits, on which such party, the next day, received the spirits, and removed the same to his own premises. M. was indicted, under § 3318 of the Revised Statutes, for omitting to enter the spirits in his book, at the time of sending them out of his stock and possession: *Held*, that such removal of the spirits was a removal from the stock and possession of the defendant, within the meaning of § 3318. *United States v. Miller*, 93

6. The term "distilled spirits," as used in §§ 3289 and 3299 of the Revised Statutes, includes all spirits which have been distilled, whether they have been subsequently rectified or not. *Boyd v. United States*, 317

7. The fact that a person has, in good faith, made advances upon distilled spirits, is no defence to an action for their forfeiture under those sections. *id.*

8. Under § 3242 of the Revised Statutes, a person does not carry on the business of a wholesale liquor dealer without having paid the special tax as required by law, who, without having paid such special tax, sells, in quantities of not less than five wine gallons at one time, a single lot of spirits which he has taken for a

debt. *United States v. Feigelsstock*,
321

9. Under that clause of § 3281 of the Revised Statutes which provides for the forfeiture of distilled spirits, the forfeiture does not operate when the statute is violated, but only at the time of the seizure of the spirits or wines. *id.*

10. Under § 3319 of the Revised Statutes, if a rectifier purchases from an authorized distiller, who is not an authorized rectifier or an authorized wholesale liquor dealer, distilled spirits, in quantities greater than 20 gallons, which were not produced by such authorized distiller, such purchaser is liable to the penalty imposed by said § 3319. *N. Y. Rectifying Co. v. United States*, 549

See INDICTMENT.

J

JUDGMENT.

1. C., as special agent of the Post-Office Department, prosecuted an action given by statute, as well for himself as for the United States, to final judgment, against T., the avails of which, as to costs, would belong to him alone, and, as to damages, to him, and the United States, in equal parts. The bond of T. and B., running to the United States alone, was taken in satisfaction of such judgment. A large part of the sum due on the bond was paid, and, out of it, the costs of the suit, belonging to C., were paid, and the balance was divided between him and the United States. Suit was then brought by the United States, on the bond, to recover the balance due on it, and judgment was obtained. Satisfaction of such judgment was entered, without payment made, by the law officers of the United States, by direction of the Post-Office Department. C. moved to set aside the entry of satisfaction: *Held*, that the motion must be denied. *United States v. Bacon*, 279

See PROBABLE CAUSE.
PROMISSORY NOTE, 2.

JURISDICTION.

1. A corporation which has appeared and answered generally in an action cannot afterward insist that this Court never acquired jurisdiction over it because process was not served upon it in the District of which it was an inhabitant at the time of service. *Kelsey v. Pennsylvania R. R. Co.*, 89

2. An omission to allege sufficiently, in a complaint, that the defendant is a citizen of a different State from that of the plaintiff, is amendable. *id.*

See ADMINISTRATOR.
APPEAL, 2.
COLLISION, 7.
EQUITY, 4.
EXTRADITION, 2, 3.
NATURALIZATION, 2.
REMOVAL OF CAUSES.
PATENT, 7.

JURY.

See DISTRICT COURT.
PRACTICE, 4 to 6, 9.

L

LABEL.

See COPYRIGHT.

LACHES.

1. To an action of debt, brought by the United States, on the bond of a surety for a paymaster in the navy, the defendant pleaded matters which amounted to allegations of laches on the part of the United States in their dealings with the paymaster, and also that the defendant had revoked his bond: *Held*, that the pleas were bad. *Raymond v. United States*, 51

See COLLISION, 4.
PROBABLE CAUSE.

LIEN.

1. The case of *The Lottawanna*, (21

Wall., 558,) decides, that a material man furnishing repairs and supplies to a vessel in her home port, does not thereby acquire any lien upon the vessel, by the general maritime law, as received in the United States, but that, so long as Congress does not interfere to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated, in each State, by State legislation; that such contracts are maritime, and fall within the domain of the Admiralty jurisdiction; and that, when, in such cases, a lien is given by the State laws, such lien may be enforced by the District Courts of the United States, under the 12th Rule, as modified by the Supreme Court of the United States, May 6th, 1872. *The John Farron*, 24

2. The provision for a lien, made by a State lien law, will be enforced, when the contract is maritime, in the Courts of Admiralty, although the same law gives an unconstitutional power to the State Courts to proceed *in rem* to enforce such lien. *id.*

3. The statute of New York, of April 24th, 1862, (*Laws of 1862*, p. 956, § 1,) gives a lien on a vessel for a debt contracted by her "master, owner, charterer, builder or consignee," "or the agent of either of them," within the State, on account of labor or materials furnished in the State for repairing such vessel. H., the owner of a vessel, contracted in writing to sell her to S., and delivered possession and control of her to S., who, as her apparent owner, contracted, in New York, upon her credit, a debt for repairs to her. In the contract of sale it was agreed that S. should have possession, and might make repairs, but that such repairs should not be a lien on the vessel, or a claim against H., but the creditor had no notice of such agreement: *Held*, that there was a lien on the vessel for the debt, under such statute. *id.*

4. A maritime lien exists for supplies furnished to a vessel in a foreign port, which were necessary and were furnished on the credit of the vessel, unless the necessity for such credit

be disproved by proper evidence. *The Native*, 84

5. A hypothecation of a vessel by her owner, to secure a pre existing debt, which, in its origin, gave no lien on the vessel, gives no priority to such hypothecation over a prior maritime lien on the vessel. *id.*

6. An American built vessel, really owned by residents of New York, was put under the British flag by a formal transfer to a British subject, and was registered in a British port. Afterwards, supplies were furnished to her in New York, by a person who was not misled as to her character: *Held*, that there was no maritime lien on the vessel for the supplies. *The Alice Tainter*, 41

7. A mortgage was given on a vessel and was recorded in pursuance of section 1 of the Act of Congress of July 29th, 1850, (9 *U. S. Stat. at Large*, 440,) now § 4192 of the Revised Statutes of the United States. Afterwards, and while she was in the possession of her owner at her home port in Buffalo, New York, repairs were there done to her, on the credit of the vessel. The statute of New York gave a lien on the vessel for such repairs, in preference to all other liens, except seamen's wages. After the repairs were made the mortgage was foreclosed and the vessel was sold, and was purchased by the claimant, on the foreclosure sale. Afterwards, a libel *in rem* was filed against the vessel to enforce such lien for repairs: *Held*, that such lien had priority over the title acquired under the foreclosure of the mortgage. *The William T. Graves*, 189

8. A British vessel, in distress, put into the Danish port of St. Thomas. Repairs to her were necessary. N. attended there to the business of the vessel, and, with the connivance of T., the master, made out fraudulent accounts against the vessel, and T. drew three drafts on the owners of the vessel, for over \$6,000, which were expressed, on their face, to be "recoverable against the vessel, freight and cargo." F., in good faith, and without knowledge of the fraud,

discounted two of the drafts. They not being paid, F. libelled the vessel and freight, *in rem*, at New York: *Held*, that the fraud of N. and T. did not invalidate the drafts in the hands of F. *The Woodland*, 499

9. *Held*, also, that the question of a lien on the vessel must be determined by the law of Great Britain, and that, by that law, the master had no right to create a lien on the vessel and freight by any other instrument than a bottomry bond. *id.*

LIFE INSURANCE.

1. This question was put to the applicant for a policy of insurance in a life insurance company: "Have the person's parents, uncles, aunts, brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?" He answered, "No, except one brother temporarily insane six years since; causes, domestic and financial trouble, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family, on either side of house, to my knowledge." The policy having been afterwards issued, in a suit brought on it the defendant proved the temporary insanity of an uncle of the applicant, but there was no evidence of any hereditary insanity in the family of the applicant: *Held*, that the question put to the applicant was only an inquiry whether any of the diseases mentioned in it had appeared among the relatives of the applicant in the form of an hereditary disease; that the applicant understood it in that sense; and that the answer was true. *Gridley v. Northwestern Ins. Co.*, 107

LIMITATION OF ACTION.

- I. The provision in § 1047 of the Revised Statutes, (formerly § 4 of the Act of February 28th, 1839, 5 *U. S. Stat at Large*, 322,) that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United

States," shall be maintained, unless commenced within five years from the time when the penalty or forfeiture accrued, relates to penalties and forfeitures incurred by infractions of the law, and does not relate to the penal sum named in a bond. *Raymond v. United States*, 51

LOTTERY.

See Post-Office.

M

MISDEMEANOR.

See CRIMINAL PRACTICE, 1.

MORTGAGE.

1. Holders of some mortgage bonds of a railroad corporation brought a suit in equity, in this Court, against the corporation, and three individual defendants, who were trustees in the mortgage, to foreclose the mortgage, and remove the trustees. To the foreclosure portion of the bill, the corporation pleaded the pendency of a foreclosure suit in a Court of the State, but, as that suit was not between the same parties or those fully authorized to represent the same parties, in the same behalf and for the same relief, the plea was overruled. *Brooks v. Vermont Central R. R. Co.*, 463
2. To the part of the bill relating to the removal of the trustees, they pleaded, that what was alleged against them, in the bill, as ground for their removal, had been done by them, but in other relations to the property and in other capacities, under the direction of a State Court. The plea was held to be bad. *id.*
3. The trustees demurred to the whole bill, on the ground, that, to proceed with it, would interfere with the possession and control of the mortgaged property by the State Court, and be a contempt of that Court: *Held*, that,

as neither the mortgagors nor any one claiming under them were in possession, such would not be the effect of proceeding with the suit for foreclosure merely, and that the demurrer must be overruled. *id.*

See BANKRUPTCY, 25.
LIEN, 7.

N

NATURALIZATION.

1. B. registered as a voter, on the production of a certificate of his naturalization, which had been issued by a State Court without his presence in Court, and without any oath having been taken by him. The certificate was regular on its face. On an indictment against B., under § 5426 of the Revised Statutes, for using, for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued: *Held*, that the mere fact that B. knew that the certificate had been issued without his presence in Court, and without any oath being taken by him, was not sufficient to warrant a conviction. *United States v. Burley*, 91

2. It is provided by § 2165 of the Revised Statutes of the United States, that an alien may be admitted to be a citizen of the United States by "a Court of record of any of the States, having common law jurisdiction, and a seal and clerk." A City Court, which is a Court of record and has a seal and a clerk, and has conferred upon it, by a statute of New York, all the power and jurisdiction of justices of the peace, and all jurisdiction and power, within the city, of the Marine Court in the city of New York, and whose judge is clothed with all the powers of a county judge and of a judge of the Supreme Court of the State at chambers, and which has civil jurisdiction in all actions for the recovery of money, when the amount recovered does not exceed \$1,000, is a Court having common law jurisdiction, within the meaning

of said § 2165. *United States v. Power*, 223

See PERJURY, 2.

NAVIGATION.

1. A steam-tug and a canal-boat lashed to her side are to be regarded, in respect to the duties of navigation, as one vessel, and that a steam vessel. *The Herbert Manton*, 37
2. A tug with a canal-boat so lashed to her must keep the canal boat out of the way of a sailing vessel, when there is danger of collision between them, and the sailing vessel must keep her course. *id.*
3. The sailing vessel has a right to rely on the observance of the rules of navigation by the tug, and cannot herself safely depart from them. *id.*
4. Judgment as to the motion, or direction of motion, of one vessel, made from another, possesses the utmost uncertainty; for, the tendency is nearly irresistible for the observer to transfer to the other vessel the motion of that on which he stands, and thus to regard the compounded motion of the two as belonging to that one which he is observing. *id.*

See COLLISION.
TOWAGE.

NEGLIGENCE.

1. A steam-tug, having a canal-boat in tow astern, going up the Hudson river, was hailed by the canal-boat to land her, and that she was leaking. The tug ran in towards a dock, and stopped and hailed the canal-boat to cast-off. She was cast-off by her hands, but one of the lines jammed. She had made no preparation of lines by which to reach the shore, and she had no anchor. She drifted up the river, and sank an hour or more after she was cast-off. The tug went on and gave no aid to the canal-boat: *Held*, that both vessels were in fault, and that the tug was liable for one-half of the damages. *The J. L. Hasbrouck*, 30

2. The value of the canal-boat is to be estimated as she was just before she was cast adrift by the tug. *id.*

See TOWAGE.

NEW TRIAL.

1. When a motion for a new trial on the ground of surprise is made, because witnesses have failed to testify as they represented, before the trial, they would testify, the question is, whether the evidence to be produced on another trial is such as will probably secure a different result. *Stellwagen v. Life Association*, 349

See CRIMINAL PRACTICE, 7.
PRACTICE, 8. 15.

NEW YORK CITY.

See FERRY.

O

OATH.

See BAIL.
PERJURY, 1.

P

PARTY.

See BILL OF LADING, 1.
COLLISION, 14.
EQUITY, 7.
TRADE-MARK, 6, 7.

PATENT.

1. Patents Generally.
2. Invention.
3. Utility.
4. Novelty, (1, 2.)
5. Abandonment, (3, 4.)
6. Specification.
7. Reissue, (5, 6.)
8. License, (7, 8.)
9. Infringement, (9, 10.)
10. Injunction, (11 to 18.)
11. Attachment, (19.)

12. Damages, (20 to 25.)
13. Profits, (26 to 29.)
14. Particular Patents.
 - (1.) Metropolitan Washing Machine Co.—Clothes-wringer, (30.)
 - (2.) Lippmann—Corset-clasp, (31.)
 - (3.) Clark—Manufacture of bolts, (32 to 34.)
 - (4.) Severance—Rock-drill, (35, 36.)
 - (5.) Schillinger—Concrete pavement, (37, 38.)
 - (6.) Miller's Falls Mfg. Co.—Bit-brace—Amidon—Bit-brace, (39 to 42.)
 - (7.) Bruff—Auger machinery, (43, 44.)
 - (8.) Miller & Co.—Lamp, (45, 46.)
 - (9.) Deuchfield—Cooling and drying meal, (47, 48.)
 - (10.) Eppinger—Plug and bunch tobacco, (49 to 51.)
 - (11.) Hopkins & Dickinson Mfg. Co.—Sash-lock, (52.)
 - (12.) Black—Tempering umbrella ribs, (53 to 55.)
 - (13.) Pinner—Tin-can, (56 to 62.)
 - (14.) Bailey—Plane, (63.)

1. Patents Generally.

See 57.

2. Invention.

See 31, 48 to 51, 59.

3. Utility.

See 59.

4. Novelty.

1. A patent, to be overthrown on the question of novelty, must be overthrown by clear and satisfactory proof. *Herring v. Nelson*, 293
2. A rejected application for a patent is not evidence that the thing described was ever used, nor is such description a patent or a publication, within the statute. *id.*

See 31, 51, 55.

5. Abandonment.

3. C. applied for a patent in January.

1859. The application was rejected in February, 1859. No appeal was taken. In February, 1860, the application was withdrawn, and the balance of the fee was refunded. In May, 1868, C. filed a new application, which was rejected on the ground of abandonment. This decision was affirmed by the Commissioner of Patents, and his decision was reversed by the Supreme Court of the District of Columbia. The Commissioner then declined to issue the patent. After the passage of the Patent Act of July 8th, 1870, (16 *U. S. Stat. at Large*, 198,) a new application was filed, and the patent was issued, it being for "improvements in breech loading guns." During the 8 years from 1860 to 1868, C. obtained 22 patents on his own application, 9 of them relating to breech-loading firearms, and though, during a part of the time, he was poor, and in debt, and in ill health, he prosecuted his other inventions with energy. During the same interval patents were granted to others embodying his inventions: *Held*, that, under § 35 of said Act of 1870, which provides that, upon the hearing of the renewal, provided for by that section, of an application before rejected or withdrawn, "abandonment shall be considered as a question of fact," the decision of the Commissioner on the question of abandonment is not final, but may be reviewed in a suit brought on the patent;

That no laches could be imputed to C. after May, 1868;

That his invention was abandoned before May, 1868. *United States Rifle Co. v. Whitney Arms Co.*, 94

4. The use of an invention for mere competitive examination, experiment and test, is not a public use. *id.*

6. Specification.

See 30, 60.

7. Reissue.

5. A patent for a combination of old elements may be reissued for a combination of fewer elements than were

contained in the combination originally claimed. *Herring v. Nelson*, 293

6. The decision in *Gill v. Wells*, (22 *Wall.*, 11,) explained. *id.*

See 45 to 47, 56.

8. License.

7. B., a patentee, granted to S. the exclusive right to make and vend the invention during the life of the patent, for a royalty. S. sued B., in equity, alleging that he was infringing the patent: *Held*, that, whether S. was a licensee or a grantee, he was suing B. on an infringement, and that the Court had jurisdiction of the suit. *Stanley Rule & Level Co. v. Bailey*, 510

8. The conditions in the instrument executed by B. to S. were held to be conditions subsequent, and it was held that such right as passed to S. remained till a forfeiture was enforced. *id.*

See 16, 29.

9. Infringement.

9. A constructor of a machine infringes, if he makes his machine with express reference to a result which he knows will happen when the machine is put to its use, and which result, if originally introduced in the machine, is an infringement. *American Boring Co. v. Sullivan Machine Co.*, 119

10. Where a patented invention is merely a combination subordinate to pre-existing devices, and has been limited to such sub-combination by the language of the claim, the patentee cannot successfully insist that he is entitled to cover by such claim the pre-existing devices; and this is true where one of the joint inventors of the junior invention is also the inventor of the senior inventions. *Hopkins Mfg. Co. v. Corbin*, 396

See 7, 11, 19, 34, 42, 52, 54, 58, 61 to 63.

10. *Injunction.*

11. The fact that a defendant who has sold an article which infringes on a patent, sold it on behalf of its owner, and had no interest in it, or in its sale, is no ground for refusing to grant an injunction against him. *Maltby v. Bobo*, 53

12. It is not proper to grant a motion for a preliminary injunction on a patent, on a theory which, although it may be true, is not supported by affidavits. *American Boring Co. v. Sullivan Machine Co.*, 119

13. Twenty days before the expiration of a patent for self-raising flour, motions for injunctions, in over 50 suits, to restrain the infringement of the patent, were made. All of the suits but one were against grocers who were selling the flour. One was against a manufacturer. The patent had been sustained, on final hearing, in other suits, but had been much litigated, and until recently. Since then there had been no unnecessary delay: *Held*, that no laches could be imputed to the plaintiff. *Rumford Chemical Works v. Vice*, 179

14. Apprehension that the grocers may fear to sell non-infringing flours, and thus cause injury to the manufacturers of such flours, is no ground for withholding injunctions against the grocers. *id.*

15. That a person who has infringed by making the infringing flour has desisted, and has no intention of again making it, is no ground for not enjoining him. *id.*

16. An application was made for a preliminary injunction, to restrain a cemetery corporation from using a stone-breaking machine, in infringement of a patent. The machine was used to break stone to keep in repair the roads of the cemetery. The defendant set up a license. The plaintiff exercised his monopoly by granting licenses to use his machine. The defendants offered to pay into Court the amount of the license fee on its machine, to abide a final decision on the question of the existence of a

license: *Held*, that, on such payment into Court, the application must be denied. *Blake v. Greenwood Cemetery*, 342

17. P. obtained a patent, as inventor, in March, 1874, for an "improvement in bungs for casks." In June, 1876, B. applied for a patent, as inventor, for the same invention. An interference was declared, and proofs were taken. The examiner decided in favor of P. On appeal, the board of examiners decided in favor of B. On further appeal, the Commissioner of Patents decided in favor of P. After the issue of the patent to P., B. and F. were in partnership with P., and the firm made the bungs and advertised them as secured by patent. After the dissolution of such partnership, B. and F. continued to make the bungs: *Held*, that P. was entitled to a preliminary injunction to restrain B. and F. from so doing. *Pentlarge v. Beeston*, 352

18. The proceedings before the Patent Office, between the same parties, cast on the defendants the burden of showing the determination of the Commissioner to have been manifestly wrong. *id.*

See 19.

11. *Attachment.*

19. Circumstances stated which govern the amount of the fine to be imposed for a contempt of Court by violating an injunction issued restraining the infringement of a patent. *Schilling v. Gunther*, 152

12. *Damages.*

20. By an interlocutory decree, a master was ordered to report the profits received by the defendant from making, using and selling an improvement in time-detectors, patented to the plaintiff, and also the damages which the plaintiff had sustained by reason of the infringement, over and above such profits. The master reported a certain sum as such profits, and also \$53 25 as damages on each one of 437 time-detectors made and sold by the defendant. The \$53 25

was arrived at, by taking \$75, the price for which the plaintiff sold his time-detectors, and deducting therefrom \$21 75, composed of \$18, cost of making, and \$3 75, commission paid for selling. The defendant was manufacturing under a patent, and was not a willful infringer. It was not made to appear that those who purchased from the defendant would have purchased from the plaintiff: *Held*,

- (1.) That the basis adopted by the master for computing the damages was erroneous, in assuming that those who bought from the defendant would have bought from the plaintiff;
- (2.) That it was also erroneous in including in the \$53 25 the manufacturer's profit;
- (3.) That the amount of the defendant's profits was an adequate compensation for the injury which it had been shown the plaintiff had suffered. *Buerk v. Imhaeuser*, 19

21. The rule of damages for the infringement of a patent, considered. *Magic Ruffle Co. v. Elm City Co.*, 109

22. In the case of a patent for an ornamental chain, as a new article of manufacture, where there is a difference in kind between the patented chain and prior chains, and where what was open to the public could not make a chain like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by him by the infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chain over what advantage he would have had from using what was so open to the public. *Mulford v. Pearce*, 141

23. In *Goulds M'f'g Co. v. Cowing*, (12 *Blatchf. C. C. R.* 243,) it was held, that the invention covered by the plaintiff's patent was of an improvement in a pump, and that, as the plaintiff had failed to show the profits or damages arising to the defendants from the use of such improvement, it was entitled to only nominal damages. On further evidence being

given, showing that, after the plaintiff's pump had been introduced into certain oil regions, other pumps could not be sold in those regions: *Held*, that such further evidence did not show that the plaintiff was entitled to other than nominal damages. *Goulds M'f'g Co. v. Cowing*, 315

24. Where a patentee claims, in a suit, damages for a reduction of his prices, caused by the defendant by infringing the patent, he must establish, by satisfactory evidence, not only that a reduction of his prices was caused by the infringement, but how much such reduction was, and how much of it was occasioned by the acts of the defendant, and how much was due to the fact that the infringing articles contained the invention patented. Such evidence must not be estimate, conjecture and opinion, but must be such as to afford a sound and safe basis of calculation. *Ingersoll v. Musgrove*, 541

25. Where a patentee claims, as damages, a loss of profits caused by a loss of sales, resulting from infringement, he must establish, by satisfactory evidence, that he would have sold more of the patented articles than he did sell if the infringing articles had not been sold, and what profit he would have made on them, and what part of such profit is to be assigned to the invention patented. Such evidence must not be conjecture and speculation. *id.*

See EQUITY, 1 to 3.

13. Profits.

26. In ascertaining the profits derived by a defendant from the use of a patented improvement in a furnace for burning wet tan as fuel, the plaintiff must show, before the master, the particular profits which accrued to the defendant from using such improvement, and is not entitled to the entire profits arising from the use of the furnace. *Black v. Munson*, 265

27. Where the plaintiff fails to give evidence as to such particular profits, the Court will not consider exceptions taken by the plaintiff to what

is alleged to be incompetent evidence put in by the defendant before the master. *id.*

28. The question of what amounts to a fixed license fee or established royalty, considered. *id.*

29. Where the profits made by a defendant from the unlawful use of a patented invention amount to more than the license fees for such use would amount to, the plaintiff, although exercising his monopoly by the granting of licenses, is entitled to recover such profits, on an accounting for profits, and is not limited to such license fees. *Wooster v. Taylor*, 408

See 20, 23 to 25.

14. Particular Patents.

(1.) *Metropolitan Washing Machine Co.—Clothes-wringer.*

30. The first claim of the reissued letters patent, division A, granted to the Metropolitan Washing Machine Company, January 7th, 1873, for an "improvement in clothes wringers," (the original letters patent having been granted on the invention of Alby H. Page, January 29th, 1867,) namely: "In a wringer having a pair of squeezing rollers, and an operating crank, and two uprights or standards, the employment of clamping means arranged to take hold of the tub at or near the base of each standard," is limited to a combination in which a swivel, or its equivalent, is employed as one of the parts of a clamping device, and must be read with reference to the specification, and as though the words "substantially as described," were inserted. *Metropolitan Wringing Co. v. Young*, 46

(2.) *Lippmann—Corset-clasp.*

31. The claim of letters patent granted to Phillipp Lippmann, September 30th, 1873, for "a corset clasp and cloth attachment," namely, "As a new article of manufacture, a covered corset clasp, the cloth of which forms a marginal flap or flaps along its

length, suitable for, and adapted to, being sewn upon the corset, substantially as described, and for use in the place of broken, injured or worn out clasps or cloth, as herein set forth," claims merely the making and selling a part of an old and known manufacture as a new way of trade, and is not valid. *Seligman v. Day*, 72

(3.) *Clark—Manufacture of bolts.*

32. The invention set forth in reissued letters patent No. 6,291, granted to William J. Clark, February 16th, 1875, for an "improvement in the manufacture of bolts from round rods," consists in the manner in which the inventor applies lateral compression to the manufacture of an angular neck, and in the manner in which he permits the shaping mechanism to become anvil heads upon which the header can operate to form a head upon the bolt. *Clark v. Kennedy M'fg Co.*, 79

33. The patent is to be construed as claiming a method or process, which consists in the combination of the operation of swaging the blank laterally by the described dies, or their equivalent, operating in substantially the same way, with the operation of upsetting the end of the bolt upon the anvil ends of the dies, to form the head. It does not claim broadly swaging by suitable dies, combined with upsetting to form a head. *id.*

34. Therefore, a machine in which the swaging is produced by dies of a construction radically different from the dies of the patent, does not infringe the patent. *id.*

(4.) *Severance—Rock drill.*

35. The invention set forth in reissued letters patent No. 8,690, granted to Asabel J. Severance, assignee of Rudolph Leschot, October 26th, 1869, for an "improved rock drill," the original letters patent having been issued to said Leschot, July 14th, 1863, defined. *American Boring Co. v. Sullivan Machine Co.*, 119

36. It is not limited to an annular bor-

ing head, but covers a convex boring head. *id.*

(5.) *Schillinger—Concrete pavement.*

37. The invention set forth in reissued letters patent granted to John J. Schillinger, May 2d, 1871, for an improved concrete pavement, defined, and the claim construed. *Schillinger v. Gunther*, 152

38. The claim is not confined to the making of joints by the permanent interposition of some material between the blocks, but it embraces the making of joints by the temporary interposition of a cutting material while the pavement is in process of formation, inasmuch as the latter method accomplishes the substantial results of the patentee's invention, in substantially the same way in which they are attained by the patentee. *id.*

(6.) *Miller's Falls M'f'g Co.—Bit brace. Amidon—Bit brace.*

39. The invention set forth in reissued letters patent granted to the Miller's Falls Manufacturing Company, November 29th, 1870, for an improvement in instruments for operating tools, such as augers, bits, &c., the shanks of which are of variable sizes, (the original patent having been granted to James M. Horton, July 8th, 1862,) defined. *Miller's Falls Co. v. Ives*, 169

40. The invention set forth in letters patent granted to Charles H. Amidon, January 14th, 1868, for an improvement in bit-stocks, defined. *id.*

41. The claims of the patents construed, and the patents held to be valid. *id.*

42. The construction of devices which infringe the patents, set forth. *id.*

(7.) *Bruff—Auger machinery.*

43. The reissued letters patent granted to Richard P. Bruff, assignee of James Swan, October 21st, 1873, for an improvement in machinery for manufacturing curved or gauge-lip augers (the original letters patent having

been issued to said Swan June 9th, 1868,) are valid. *Bruff v. Ives*, 198

44. The invention defined and the claims of the patent construed. *id.*

(8.) *Miller & Co.—Lamp.*

45. The second claim of the reissued letters patent granted to E. Miller & Co., as assignees of Joshua E. Ambrose, January 11th, 1876, for an "improvement in lamps," (the original patent having been granted October 16th, 1860, and reissued May 20th, 1873, and, as so reissued, extended for 7 years from October 16th, 1874,) namely, "The combination, in a lamp burner, of the following elements: first, a deflector; second, a perforated air distributor, which, with the deflector, forms the combustion chamber; third, a wick tube, extending from the fount to the combustion chamber; fourth, a tube or passage to conduct the gas from the fount to said combustion chamber, substantially as described," is for a different invention from any which was described and claimed in the original patent, and is invalid. *Miller v. Bridgeport Brass Co.*, 282

46. The combination contained in said second claim contains a lesser number of ingredients than the combination which composed the original invention, and the specification of the original patent did not suggest that a lamp containing the modified combination of the second claim of the reissued patent was feasible and within the scope of the invention, and, therefore, under the rule laid down in *Gill v. Wells*, (22 Wall., 1,) said second claim is void. *id.*

(9.) *Deuchfield—Cooling and drying meal.*

47. The first claim of reissued letters patent granted to John Deuchfield, January 16th, 1872, for an "improvement in cooling and drying meal," and extended April 17th, 1872, for seven years from April 20th, 1872, (the original patent having been granted to said Deuchfield April 20th, 1858,) namely, "The arrangement and combination of the suction

fan G, and the spout I, with the meal-chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F, and elevator F', substantially as and for the purpose set forth," is not subject to the objection that it is for a different invention from that for which the original patent was issued, although the original patent claimed only a combination which embraced the elements composing the combination claimed in said first claim with other elements. *Herring v. Nelson*, 293

48. The combination of machinery for cooling meal, in the process of converting grain into flour, with machinery for preventing the waste of meal, constitutes a patentable combination, and not a mere aggregation. *id.*

(10.) *Eppinger—Plug and bunch tobacco.*

49. The letters patent granted to Isaac Eppinger, June 17th, 1878, for an "improvement in plug and bunch tobacco," are valid. *Eppinger v. Richcy*, 307

50. The claim of said patent, namely, "Plug or bunch tobacco made as herein described, the same consisting of a rope or strand, composed of a sweetened or prepared filler, inclosed in a binder, in turn enveloped in a wrapper, the said rope being coiled around a central core, forming a continuous part of the rope, and the bunch thus made being subjected to a pressure, as and for the purposes set forth," claims a patentable invention. *id.*

51. The peculiarity of the invention is in the form and shape of the coil, and the change required invention, and the article produced is a new and useful article of manufacture. *id.*

(11.) *Hopkins & Dickinson M'fg Co—Sash lock.*

52. The claim of the reissued letters patent, granted October 11th, 1875, to the Hopkins & Dickinson Manufacturing Company, as assignees of George McGregor and George Voll, for an "improved sash-lock or sash-

fastener," (the original patent having been granted to said Voll and McGregor, as inventors, March 30th, 1869,) namely, "A vibrating lever, provided with a bolt, in combination with a striking plate or hook, and with a catch segment behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified," does not include a vertically moving bolt in combination with a socket upon the base-plate. *Hopkins M'fg Co. v. Corbin*, 396

(12.) *Black—Tempering umbrella ribs.*

53. The invention set forth in letters patent granted to A. Stewart Black, July 14th, 1868, for an "improvement in tempering umbrella ribs," defined. *American M'fg Co. v. Lane*, 438

54. The first claim of said patent, namely, "Constructing the tempering die with a square hole, corresponding in size to the wire to be tempered, in order that the wire may be straightened in all directions, and the flattened portions of the wire be brought in line with each other, as and for the purposes specified," is infringed by the use, for the tempering of umbrella ribs of U-shaped wire, with wider flattened parts in them, of a die formed of two plates, one above and one below, with the groove in one plate shallow and semi-elliptical, to accommodate one edge of the flattened parts of the rib, and with the groove in the other plate broader and deeper, and, in its cross-section, the shape of the body of the wire, with a channel opposite to and like the groove in the other plate, to accommodate the other edge of the flattened part of the rib. *id.*

55. The prior existence of a square hole or groove for the purpose of drawing through it square bars or strips of metal, to compress them and straighten them, does not anticipate the invention claimed in said first claim. *id.*

(13.) *Pinner—Tin can.*

56. The invention described in the re-issued letters patent granted to Moritz Pinner, November 1st, 1864, for an improvement in tin cans, (the original patent having been granted to Jean Bouvet, June 28th, 1864,) is not a different one from that described in the original patent, although, in the reissue, the device is described as applicable to different forms of construction of cans, and by different modes, from those in the original. *De Florez v. Reynolds*, 505
57. The decision of the Patent Office, in granting a patent, that the inventor had made the necessary preliminary statutory oath, is final. *id.*
58. Soldering a flat strip of metal over a slot, by soldering the edges of the strip to those of the slot, is not different from soldering a round wire into a slot, by connecting the edges of the slot with solder over the wire. *id.*
59. The necessary utility, to uphold a patent, considered. *id.*
60. The requirement, in the patent, that the solder is to be torn, indicates that it must not be of a kind so hard that it cannot be torn. *id.*
61. A person who infringes a patent is liable for the infringement, although what he does may be an improvement upon the patented device. *id.*
62. The proof of infringement was the sale of a can by the defendant, purchased for and by the direction of the plaintiff. The can was sold in the usual course of the defendant's business. On all the evidence, it was held that the defendant was dealing in the infringing cans in such a manner that, except as to the one can referred to, he was liable to account, and ought to be restrained by injunction. *id.*

(14.) *Bailey—Plane.*

63. The Victor plane, covered by letters patent granted to Leonard Bailey, December 12th, 1876, is an in-

fringement of the third and fourth claims of the reissued letters patent granted to Leonard Bailey, June 22d, 1875, the original patent having been granted to him August 6th, 1867. *Stanley Rule & Level Co. v. Bailey*, 510

PENALTY.

See FORFEITURE.

LIMITATION OF ACTION.

PERJURY.

1. On a complaint before O., a United States Commissioner in New York, against S., for having committed an offence against the United States, cognizable by the Courts of the District of Columbia, S. was committed by O. to await the issuing by the District Judge of a warrant for his removal for trial to such District. Before such warrant was issued, V. went before O., to justify as bail for S., and made oath before him to a deposition concerning his property, which was signed by him and entitled in the proceeding against S. Afterwards S. was released by the District Judge on bail, on a bail bond signed by V. It did not appear that the deposition of V. was exhibited to the District Judge, or that any further steps were taken before O. after the deposition was made. V., having been indicted for, and convicted of, perjury, in making, in such deposition, statements of material matter, which he did not believe to be true, moved for a new trial, on the ground that the deposition was not made in a case "in which a law of the United States authorizes an oath to be administered," within § 5392 of the Revised Statutes: *Held*, that the motion must be denied. *United States v. Volz*, 15
2. On an application to a State Court for the naturalization of a foreigner, J. testified, as a witness, that he was well acquainted with the applicant. It appeared that he was a total stranger to the applicant, and volunteered as a witness: *Held*, that this was sufficient evidence to warrant a conviction.

tion of J., on an indictment for perjury, under § 5392 of the Revised States. *United States v. Jones*, 90

PLEA.

1. A plea in abatement to an indictment, averred that 48 persons were summoned as grand jurors; that the names of such persons were not drawn by the clerks, as required by the Rules; that one of the grand jurors was a non-resident; and that several of them were not possessed of the proper property qualification. It did not aver any prejudice to the accused. On demurrer to the plea: *Held*, that the plea was bad. *United States v. Tuska*, 5

See LACHES.
MORTGAGE, 1, 2.

PLEADING.

1. M. brought an action at law, in this Court, on a judgment recovered by him against O., in another Court. O., by answer, set up a variety of matters which were not defences at common law against the judgment, but which were claimed to give O. an equitable right to prevent the enforcement of the judgment. On demurrer to the answer: *Held*, that the demurrer must be sustained. *Montejo v. Owen*, 324
2. Section 914 of the Revised Statutes of the United States does not authorize such an answer to be put in, in an action at law. *id.*
3. Where a declaration sets forth as the cause of action fraudulent representations made to induce, and which did induce, a sale of goods on credit, the averments of fraud will not be stricken out, on the motion of the defendant, so as to make the action only one of assumpsit for goods sold and delivered. *Walker v. Byrnes*, 347

See BOND.
EQUITY, 4 to 9.
JURISDICTION, 2.
PLEA.

POST OFFICE.

1. The provisions of § 3894 of the Revised Statutes, as amended by § 2 of the Act of July 12th, 1876, (19 U.S. Stat. at Large, 90,) prohibit the carrying in the mail of letters or circulars concerning lotteries, and punish as a crime the offence of knowingly depositing or sending anything to be conveyed by mail, in violation of said § 3894, and apply to sealed letters, and are not unconstitutional or invalid. *In re Jackson*, 245
2. Although the only punishment prescribed by § 3894 is a fine, a person who violates the statute may be arrested for trial and imprisoned or bailed. *id.*

See CRIMINAL PRACTICE, 3, 4.
JUDGMENT.

PRACTICE.

1. In an action at law in a Federal Court in New York, a defendant cannot, before the trial, be examined as a witness for the plaintiff out of Court, although such examination is provided for by the statute of New York, in suits in the Courts of New York. *Beardsley v. Littell*, 102
2. The whole subject of oral testimony in actions at common law in the Courts of the United States is regulated by the statutes of the United States. Under the provisions of those statutes, the examination of an adverse party, as a witness, before trial, in a common law suit, cannot be had; and there is nothing in section 914 of the Revised Statutes of the United States, which provides for the conformity of the practice of the Federal Courts, in common law suits, to that of the State Courts, that supersedes those provisions. *id.*
3. If a master's report, made under an interlocutory decree, discloses facts properly heard by him, which, in the opinion of the Court, should be further investigated, it is competent for the Court to direct such an investigation. *Magic Raffle Co. v. Elm City Co.*, 109

4. In an action of tort, in a Court of the United States, where the defendant suffers a default, the plaintiff has no constitutional right to have the damages assessed by a jury. *Raymond v. Danbury & Norwalk R. R. Co.*, 138
5. Such assessment is a matter of practice, and may be made according to the practice of the Courts of the State in which the Federal Court is held. *id.*
6. In Connecticut, such assessment may be made by the Court. *id.*
7. In a suit in equity on a patent, a preliminary injunction was granted, on notice and without opposition. Afterwards a decree *pro confesso* was entered, and a reference ordered, which was commenced, and witnesses were examined, and the defendants produced their accounts and attended by counsel. Afterwards they moved to set aside the decree and for leave to file an answer, alleging matters which had been set up in a prior suit on the patent and overruled by the Court, and sundry new matters. No mistake or misapprehension or neglect of counsel was alleged. The plaintiffs offered to limit their recovery to \$500, which would be less than the expense to the defendants of trying the issues. The defendants had ceased to use the patented invention: *Held*, that the motion must be denied, on the plaintiffs stipulating to limit their recovery to \$500. *Andrews v. Denlow*, 182
8. An order of reference, made on consent, in an action at law, provided that the cause be referred to H. to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the Court, and that, on filing such report with the clerk of the Court, judgment be entered in conformity therewith, "the same as if the cause had been tried before the Court." On the report, judgment was entered for the defendant, for costs. The plaintiff moved for a stay of proceedings, under § 987 of the Revised Statutes, with a view of applying to the Court to grant a new trial: *Held*, that the Court had no power to grant a new trial. *Neafie v. Cheesebrough*, 313
9. Whether a District Court can try an action at law otherwise than by a jury, suggested. *Howard v. Crompton*, 328
10. The rule stated, as to when a bill of exceptions may be signed and filed, and as to the circumstances under which a judgment will be vacated for the purpose of allowing a bill of exceptions which was not signed at the proper term, to be subsequently signed and filed. *Eagle Mfg. Co. v. Draper*, 334
11. A suit in equity was heard on bill and answer, and the bill was dismissed. The plaintiff afterwards, before a final decree was entered, asked to be allowed to file a general replication and take testimony, offering to pay the accrued costs. No mistake or inadvertence was suggested: *Held*, that the motion must be denied. *Bullinger v. Mackey*, 355
12. After a lapse of two and a half years, this Court refused to allow a bill of exceptions to be signed and filed, no step looking to that end having ever been before taken, and a writ of error in the case being pending in the Supreme Court. *Herbert v. Butler*, 357
13. Under the circumstances of this case, the Court refused to open an interlocutory decree. *Ingersoll v. Benham*, 362
14. In a suit in equity, the proofs taken on the part of the defendant were not filed, because the examiner's fees had not been paid. The plaintiff moved for an order that such proofs be filed, and that an attachment issue against the defendant to compel payment of such fees: *Held*, that the motion must be denied. *Fress v. Biedenfeld*, 402
15. The trial before a jury of an action at law, in this Court, occupied nearly four months, being portions of three terms of the Court. After the final adjournment of the term at which the verdict was rendered, which was for the defendant, a stay on the verdict

was granted, and, by order, the time for the plaintiff to make a case was extended, and the stay was continued, by order, until the hearing and decision on a motion for a new trial: *Held*, that the motion for a new trial, on a case, before judgment, could be entertained after the expiration of the term at which the action was tried; and that the practice pursued was regular. *Emma Silver Mining Co. v. Park*, 411

16. All motions, in a suit at common law, which are required, by the practice of the State Courts of New York, to be made at a special term of a State Court, may be made at a stated term of a Federal Court. *id.*

17. An unincorporated association of persons was sued as "The Albany and Canal Line." It waived process, and appeared by that name, and answered without objecting that it was improperly sued: *Held*, that it could not afterwards raise such objection. *Deems v. The Albany & Canal Line*, 474

See ADMIRALTY.

APPEAL, 2.

BANKRUPTCY, 1.

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CRIMINAL PRACTICE.

EQUITY, 1 to 7.

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NEW TRIAL.

PLEADING.

PROBABLE CAUSE.

TRADE-MARK, 6.

TROVER, 1.

PRISONER.

See CRIMINAL PRACTICE, 5, 6.

PROBABLE CAUSE.

1. A judgment having been entered against a defendant, as a collector of customs, in a "charges and commissions" case, for duties overpaid, under protest, which duties had been paid into the Treasury by the defendant, and such judgment not having

been paid by the Treasury Department, the plaintiff issued an execution against the property of the defendant. The defendant applied to the Court for a certificate, under § 989 of the Revised Statutes, that there was probable cause for the acts done by the collector, and for a stay of the execution: *Held*, that the application must be granted. *Cox v. Barney*, 289

2. Such certificate may be granted by a different judge from the one before whom the verdict was rendered. *id.*

3. It having been the practice of defendants in like cases not to ask for a certificate of probable cause until the judgment was about to be paid by the Treasury Department, no laches or delay can be alleged against a defendant for not applying for such certificate before the issuing of an execution. *id.*

PROMISSORY NOTE.

1. H., having a promissory note made by B., wrongfully diverted it and transferred it to N., as collateral security for a precedent debt due by H. to N., who took it in good faith: *Held*, that N. could not be affected by any equities between B. and H. *National Bank v. Brooklyn City R. R. Co.*, 242

2. N. sued an endorser of the note in a State Court, and was defeated, on the ground that the law, as held by the State Court, was, that N., having taken the note as security for a precedent debt, took it subject to the equities between the prior parties. Afterwards N. sued the maker on the same note: *Held*, that the judgment in the suit against the endorser was not a bar in favor of the maker. *id.*

R

RAILROAD.

See CARRIER, 1.

FERRY, 1.

RECEIVER.

See TROVER, 1.

REMOVAL OF CAUSES.

1. The plaintiff in a suit in equity in a State Court presented to that Court, on the 4th of February, 1876, a petition for its removal to this Court, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) with the proper bond. The session of this Court next after the 4th of February began, by law, on the last Monday of February. The plaintiff did not file in this Court a copy of the record until the first day of the ensuing April term of this Court: *Held*, that the suit must be remanded to the State Court, with costs, as not removed to this Court according to law. *Bright v. Milwaukee & St. Paul R. R. Co.*, 214
2. A suit was brought in a State Court, in August, 1875, and proceedings for its removal into this Court were taken, under subdivision 3 of § 639 of the Revised Statutes. The bond given was such a bond as is provided for by § 639, and not such a bond as is provided for by § 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) It contained no provision for costs: *Held*, that the suit was not properly removed. *Torrey v. Grant Locomotive Works*, 269
3. Under § 3 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) a civil suit brought in a State Court, where the matter in dispute exceeds, exclusive of costs, \$500, and in which there is a controversy between citizens of different States, may be removed into the Circuit Court of the United States, even though the case is not one arising under the Constitution, laws or treaties of the United States. *Low v. Wayne Co. Savings Bank*, 449
4. Where the defendant removed a suit into this Court, under § 2 of the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470,) on the ground that the defendant was a Swiss corporation, and that the plaintiffs, three in num-

ber, were citizens of the State of New York, and it appeared that two of the plaintiffs were, when the suit was commenced, aliens and British subjects, and the third was a citizen of New York, the cause was, on the application of the plaintiffs, remanded to the State Court, on the ground that the requisite jurisdictional citizenship must exist as to each individual plaintiff. *Sawyer v. Switzerland Marine Ins. Co.*, 451

5. A suit in which the plaintiff is a citizen of New York, and three of the defendants are citizens of New York, and one defendant is a citizen of Ohio, and one defendant is a citizen of Indiana, and none of the parties are nominal parties, cannot be removed into this Court, under the Act of March 3d, 1875, (18 *U. S. Stat. at Large*, 470.) *Van Brunt v. Corbin*, 496

See COSTS.

REPEAL.

See FORFEITURE.

REVIEW.

See BANKRUPTCY, 1.

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TOWAGE.

STIPULATION.

See ADMIRALTY, 2.

SUFFRAGE.

1. The laws of the State of New York do not deprive of the right of suffrage a person who has been convicted in a Court of the United States of the offence of uttering a counterfeited security of the United States, such offence being created by § 5431 of the Revised Statutes of the United States. *United States v. Barnabo*, 74

See CRIMINAL PRACTICE, 2.

T

TAXATION.

1. The provisions of the Act of the Legislature of Vermont, (*Laws of Vermont*, 1874, *Act No. 1*, p. 16,) providing for the taxation of the property of railroads, are not invalid by reason of the fact that lands improved by having a railroad built on them are not made taxable until they have been so improved ten years. *Wells v. Central Vt. R. R. Co.*, 426

See INJUNCTION, 2.

TENDER.

See TROVER, 2.

TOWAGE.

1. In a suit founded on an alleged breach of a contract of towage, negligence or unskilfulness in the tug must be shown; and the tug is not negligent, if she exercises that degree of caution and skill which prudent navigators usually employ in similar services. *The Brazos*, 446
2. Where the master of a tug intended to reach a bar at high water, with his tow, and would, if he had done so, have found sufficient water there to take his tow across the bar safely, but miscalculated, and reached the bar after high water, and his tow grounded and was damaged: *Held*, that such miscalculation was negligence, for which the tug was responsible. *id.*
3. A steam tug was held liable for negligence, in towing a canal-boat in such manner that she collided with another vessel and was sunk, although the written contract of towage contained this clause: "All towing at the risk of the master and owners of the boat or vessel towed." *Deems v. The Albany & Canal Line*, 474

See NAVIGATION, 1, 2.
NEGLIGENCE.

TOWN BONDS.

1. The provisions of the Act of the

Legislature of New York, passed May 5th, 1870, incorporating the village of Edgewater, Richmond County, are so repugnant to the provisions of the Act of May 11th, 1869, authorizing the issuing of bonds by certain towns, that the town of Southfield, in Richmond County, was excepted from the operation of the Act of 1869, and the Act of 1869 was repealed so far as that town was concerned, and bonds purporting to have been issued by that town under the Act of 1869, after the passage of the Act of 1870, are void, because such bonds were issued without authority of law. *Bull v. Town of Southfield*, 216

2. A statute authorizing a town to issue bonds in aid of the construction of a railroad, provided that the bonds should be under the hands and seals of commissioners. They issued coupon bonds which were not sealed, although their wording showed that sealing was intended, and the coupons were not sealed: *Held*, in a suit on the coupons, that the bonds and coupons were void. *Avery v. Town of Springport*, 272

TRADE-MARK.

1. The exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with the collars, cannot be claimed as a trade-mark, either under the statute or by virtue of the general law of trade-marks. *Harrington v. Libby*, 128
2. The right of A. to a trade-mark in connection with the dry white oxide of zinc, is not infringed by the sale of a paint composed of a white oxide of zinc ground in oil, and a truly represented as containing white oxide of zinc made by A., such trade-mark never having been applied by A. to that article ground in oil. *La Société v. Baxter*, 261
3. Where a person who claimed property in a trade-mark, had acquired it, if at all, by the use, in circulars, of fraudulent and deceptive and untrue language as to the origin and quali-

ties of the article in respect of which the trade-mark was claimed: *Held*, that he had lost his right to claim the assistance of a Court of equity to protect his trade-mark. *Seabury v. Grosvenor*, 262

4. E. & T. Fairbanks & Co., manufacturers of scales, alleged that J. made scales, by using, to make the iron castings thereof, the corresponding parts of a scale made by them, to form the moulds for those castings, and that the general shape and arrangement and color and external appearance of such scales were imitated from the Fairbanks' scale so nearly that only an expert in scales could distinguish the differences between them. The words "Fairbanks' patent" were cast on the scales made by both parties. All the patents which Fairbanks & Co. had had, had expired. Fairbanks & Co. applied for an injunction to restrain J. from using the words "Fairbanks' patent" on his scales, and from making or selling an imitation of Fairbanks & Co.'s scales: *Held*, that the application must be denied; that the words "Fairbanks' patent" were not a trade-mark; and that J. did not represent his scales to be of the make of Fairbanks & Co. *Fairbanks v. Jacobus*, 337

5. The use, on labels and bottles, of the word *Apollinis*, in connection with the representation of a bow and arrow or anchor, was restrained, by preliminary injunction, on account of the similarity between them and the word *Apollinaris* and the representation of an anchor, as before used by the plaintiff, as being calculated and designed to induce the supposition, by users and dealers, that the waters of the defendant, so marked, were the waters of the plaintiff; but the plaintiff was ordered to give a bond to pay all damages to the defendant, if it should be finally determined that the plaintiff was not entitled to the injunction. *Action v. Somborn*, 380

6. Where a bill was brought in the name and right of a firm, by a person claiming to be its sole member, to enforce its right to a method of iden-

tifying its wares, and it appeared that the right belonged to the firm, and that there was another member of it, who was not a party plaintiff, and the case was a meritorious one, opportunity was allowed to bring in such other member. *Fress v. Bachof*, 482

7. The plaintiffs' firm had long been accustomed to pack a compound called "Hamburg tea," in long cylindrical packages with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm name printed across a white label within a circle pasted across the ends of the string, and the same embossed with the words "Hamburg, Hopfensack, 6," on another white label pasted on the package, so that the package, by its form and colors, would be at once known by its general appearance, without taking time to read anything on it; and their wares had come to be well known as theirs by the appearance of the packages. B. openly used such style of package and firm name to put up Hamburg tea. He then discontinued the use of the firm name, but continued to use the exact form and style of package, substituting his own name merely for that of the firm on the labels: *Held*, that, with the proper parties before the Court, B. ought to be restrained by injunction from such use of the plaintiffs' symbols. *id.*

TREATY.

See EXTRADITION, 1, 2.

TROVER.

1. The B. Co., of Connecticut, had in the hands of C., in New York, goods for sale on commission, on which C. had a lien as security for his liability on accommodation acceptances which he had given to the B. Co. A voluntary assignment in insolvency was made by C. to B., under the laws of New York. B. took possession of such goods, with notice that they belonged to the B. Co. Afterward the B. Co. tendered the acceptances to B.,

and demanded the goods, but B. refused to deliver them, and sold them. Their market value was \$7,500. Subsequently T. was appointed receiver of the B. Co., under the laws of Connecticut, and tendered the acceptances to B., and demanded the goods, but B. refused to deliver them. T. then sued B. in this Court, and, at the trial, was allowed to amend his declaration by adding counts for a conversion prior to T.'s appointment: *Held*,

(1.) B. rightfully took possession of the goods of the B. Co., but tortiously converted them thereafter;

(2.) T., as receiver, had a right to sue B. in Connecticut for a conversion happening prior to T.'s appointment;

(3.) T. was entitled to a judgment for \$7,500, and interest at 6 per cent. from the date of the demand by the B. Co., and the costs after the amendment, but should pay to B. his costs until the amendment. *Terry v. Bamberger*; 234

2. A. delivered wool and yarn to O., to be made into cloth, at a specified cost, to be paid by A. The wool and the yarn and the goods were to be continuously the property of A. O. began the manufacture of goods from the materials. Thereafter, the property came into the possession of M., as the assignee in bankruptcy of O. At that time, it was in the condition of dyed wool, mixed with shoddy, and woolen yarns in the various stages of manufacture into cloth, and was of small market value, and not salable. A. demanded from M. the specific wool and yarn delivered to O., and the yarns in process of manufacture, and offered to pay all charges on them, if informed of the amount. M. completed the manufacture of the goods, and expended \$800 in finishing them, and sold them for \$3,193 50. A. sued M. in trover, for the conversion of the wool and yarns and goods: *Held*, that it was not necessary for A. to prove an actual tender of an amount sufficient to cover the value of the work and materials supplied by O., but that the offer made to pay the charges was sufficient. *Aborn v. Mason*, 405

3. *Held*, also, that A. was entitled to recover the avails of the goods, less the cost of the materials furnished by O. and by M., and the expense of manufacture. *id.*

TRUSTEE.

See MORTGAGE, 2, 3.

TUG.

See NAVIGATION, 1, 2.
NEGLIGENCE.
TOWAGE.

U

UNITED STATES.

See CONSTITUTION OF THE UNITED STATES.
LACHES.

UNITED STATES COMMISSIONER.

See BAIL.
EXTRADITION, 2, 3.
PERJURY, 1.

USURY.

1. A promissory note was signed by its maker in New York, and transmitted by him to Rhode Island, to be discounted in that State. It was there discounted, and it had no inception as an obligation to pay until it was so discounted: *Held*, that the contract of the maker was made in Rhode Island, and that its legality or illegality, on the question of usury, was to be determined by the law of Rhode Island, and not by that of New York. *Providence Co. Savings Bank v. Frost*, 233
2. The decision in *Providence Co. Savings Bank v. Frost*, (8 Benedict, 293,) affirmed. *id.*

V

VERDICT.

See EVIDENCE, 12.

VERMONT.

See CONSTITUTION OF VERMONT.
TAXATION.

VESSEL.

See BILL OF LADING.

CARRIER, 2 to 4.
CHARTER PARTY.
COLLISION.
DAMAGES.
LIEN.
NAVIGATION.
NEGLECTENCE.
TOWAGE.

W

WITNESS.

See PRACTICE, 1, 2.



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